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CONVEYANCER'S NOTEBOOK.

Legislation.—Practitioners may well sigh over the legislative activity of our Parliament, but conveyancing practitioners have been left in comparative peace, apart from finance, during the last few years. This session has betrayed a new eruption in the shape of several statutes, all mercifully brief, but some of them of considerable practical importance. In view of this we have decided upon a number of separate articles to deal with those of outstanding importance. In the last number we dealt with the Rent Restriction Act, in this we treat of leasehold covenants, and in the next issue we shall have an article on the new Act imposing restrictions on testamentary disposition. There is also the Limitation Bill which will revise drastically the existing law, in itself most desirable, but as the provisions will not come into force until January 1, 1940, we have left it to be analysed in a future issue. Measures of less importance or narrower scope we propose to continue to deal with in the "Conveyancer's Notebook". May we add that experience of the 1925 legislation offers the warning that no matter how carefully comment is made on a statute it is not possible to offer an interpretation that may meet with the approval of the Court. We note in this very number at least one decision that must come as a shock to a large number of practitioners. The most the practitioner can hope to do is to warn his clients of the points as they arise and, where circumstances require, seek the guidance of the Court.

Sale and purchase of parsonage houses and lands.—The Parsonages Measure, 1930, is repealed by the Parsonages

Measure, 1938, which comes into force on the day notified in the *London Gazette*. This Measure extends to the whole of the Provinces of Canterbury and York, except the Channel Islands and the Isle of Man.

The Parsonages Measure, 1938, is substantially similar to the Measure of 1930 which it repeals. It is invaluable as an enabling Measure in dealing with parsonage houses which have become inadequate by being too large or inconvenient for continuance for that purpose. It enables them even to be pulled down and the buildings sold : section 1 (1). Reservations and exceptions of any kind and the imposition of restrictive covenants are authorised : section 1 (1). There is equally power to build or to acquire buildings or sites for building : section 2. Where a sale is made the patron has a right of pre-emption to be exercised within fourteen days after notice of the proposed sale, and provision is made for fixing the price in the event of failure to agree : section 4. The conveyance is made by or to the incumbent in his corporate capacity (provisions are made for the Bishop of the diocese to act in a vacancy), no licence in mortmain is required (section 9 (1)), and purchase money is paid to Queen Anne's Bounty, the receipt of whose Treasurer is a sufficient discharge : section 1 (5). There are somewhat elaborate provisions relating to notices and consents by the Bishop, the Diocesan Dilapidations Board and Parochial Church Council, but it is provided (section 9 (2)) that the sealing by Queen Anne's Bounty of any conveyance under the Measure shall be " conclusive evidence " that all the requirements of the Measure with respect to the transaction have been complied with. The following sub-section requires every conveyance of land *purchased for a benefice* to be registered in the registry of the diocese, and presumably the previous sub-section does not apply. There is, however, nothing in the Measure which prescribes the effect of failure to comply with the Measure, so presumably the conveyance is void altogether as unauthorised by law, unless it can be validated under one of the very numerous other statutory provisions (see Cripps, *Law of Church and Clergy*, 8th ed., 418 *et seq.*).

Section 15 provides for Rules being made under the Measure. These Rules (see S. R. & O., 1938, No. 636) concern the definition of patron and procedure concerning consents, etc., together with some forms of notices and consent. In practice Queen Anne's Bounty will normally be concerned with any transactions falling within the Measure, and we can only advise practitioners who are not familiar with the practice in these matters to consult

them in the earliest stages. Where such a conveyance appears on a title, for example, where a quondam parsonage is resold by its purchaser, the solicitor acting for the new purchaser will be able to rely upon the provision mentioned above where Queen Anne's Bounty have sealed the conveyance, as no doubt they will be joined as parties to receive the purchase money.

Churches and churchyards—faculties.—There is a penal clause in the Faculties Jurisdiction Measure, 1938, which alone would make it call for comment. It provides that if in any proceedings for a faculty, whether opposed or not, it appears to the Court that any party to the suit (and there is special power to cite any person responsible or partly responsible notwithstanding that such person resides out of the diocese) is responsible or partly responsible for the introduction into or removal from a church of any articles without the necessary faculty, or for the execution of any work in any church without the necessary faculty, the Court may order the whole or any part of the costs and expenses of the proceedings or consequent thereon (presumably including the expenses of replacing or removal) to be paid by such person. The provision does not appear to relate to things done in churchyards, though a faculty may be required there. Apart from this provision the costs in a faculty suit are in the discretion of the Court and normally follow the event.

It is thought that the obvious purpose behind this Measure is to tighten the control over the decoration and ornaments of churches, while at the same time to afford some relief from the constant expense of obtaining faculties. There seems to be very considerable ignorance on the part of incumbents, churchwardens and Parochial Church Councils, who share the responsibilities of maintenance and care of church fabrics and decorations, on their duty to obtain faculties for any major alterations of construction or decoration or the introduction of church ornaments. It will generally be found, no doubt, that the persons falling within the three categories just mentioned are responsible for any articles or work falling within the penal provision just mentioned.

Though there is clearly a discretion on the part of these persons to make urgent repairs to the structure and minor decorations, the law concerning faculties is rather stringent (see Cripps, *Law of Church and Clergy*, 8th ed., Chap. VII, § 2). Quite apart, therefore, from the intentional introduction of illegal ornaments or the wrongful removal of existing ornaments much

appears to be done without sanction which ought to have received a licence from the Ecclesiastical Court. The law concerning ornaments and decorations is elaborate (see Cripps, *op. cit.*, Chap. XII). In the present unhappy state of dissension in the Church and having regard to the prospect of this liability which will doubtless be enforced by the Ecclesiastical Courts, it is highly desirable that those many persons concerned with church affairs and their legal advisers should pay more attention than in the past to this aspect of ecclesiastical law.

Apart from the clause just mentioned the purpose of the Measure is threefold. First, it makes the Archdeacon of the Archdeaconry within which the church is situate an interested party in any proceeding for a faculty (section 1). This, *inter alia*, enables an Archdeacon to initiate proceedings for the grant of a faculty for the introduction or removal of any ornament or alteration in the church. Formerly this right was limited to parishioners and a few others having a personal interest. Secondly, it provides for the creation of an advisory committee whose duty it shall be to give advice to intending applicants for faculties and to advise the Chancellor (if required) or the Archdeacon before the grant of a faculty or the issue of a certificate (section 5). The committee is to be appointed by the Bishop and no composition is mentioned in the Measure, but there is a general Rule making power (section 7) which may be applicable to this as well as some of the matters more particularly prescribed. Thirdly, it introduces a new procedure to avoid the delay and expense of a faculty in certain cases. Section 6 provides that every application received by the Registrar of a diocese from the incumbent and churchwardens, supported by a resolution of the Parochial Church Council, for authority to carry out (a) repairs to a church not involving any substantial alteration in the structure thereof, or (b) the redecoration of a church, shall be referred to the Archdeacon. The Archdeacon may then either (i) with the consent of the advisory committee grant a certificate of authorisation; or (ii) direct an application for a faculty. This procedure may be followed in his discretion by any Chancellor with regard to any other application which in his opinion is unlikely to give rise to any controversy or dissatisfaction in the parish, and is not of such importance as to justify the expense of proceedings for a faculty. The nature and restrictions of this new procedure may come as some surprise and a grim warning of the narrow limits within which the incumbent and churchwardens may act upon their own initiative. It is to be noted that the new procedure applies only to redecoration, which is not

defined, and not to new decoration which would still require a faculty unless the Chancellor waives it within section 7.

In connection with these faculty cases we may, perhaps, call attention to the recent decision of the Consistory Court of Truro : *Re St. Hilary* (1938), 54 T. L. R. 975. The case is particularly of interest for the adoption by the Chancellor and his exposition of certain principles guiding the Court in faculty cases taken from the judgment of Chancellor Errington in *Re St. Saviour's*, [1932] P. 134. In particular in this case the Chancellor drew a distinction between ornaments which have been held to be illegal in their very nature, and those which are illegal only owing to their being used, or of the likelihood of their being used, for illegal ceremonies or superstitious purposes. In the first class no faculty can be granted for their use, though in some exceptional cases, as indeed in this case, no order may be made temporarily. The second class is a matter of discretion to authorise them or not. It is not necessary to pursue the rather large collection of ornaments litigated in this case though it makes interesting reading. It may be observed, however, that " the Stations of the Cross " were included in the list of ornaments not necessarily illegal but only so where likely to be used for superstitious uses or illegal ceremonies, whereas Cripps (*op. cit.*, p. 237) states this as one class of ornaments without question illegal, basing that view on a long line of cases. It may also be observed that one of the factors considered by the learned Chancellor in deciding to exercise his discretion appears to have been the character of the existing incumbent. As the history of the particular parish shows, incumbents may vary considerably in their views and consequently while no immediate prospect of improper use could be suggested it would seem that a confirmatory faculty might give rise to improper use if the position of the ornament was such that it could be so employed. The case deserves careful study by all those concerned with ornaments of a church.

Lessees and the freehold title—constructive notice.—A correspondent has sent us the following note. Available space does not permit us to make observations in this number, but in view of the importance of the topic we print the note and should be glad to have the views of other subscribers.

Differences of opinion have arisen amongst solicitors practising in this district in cases of investigation of leasehold titles to land.

Two opposing views are held and the difficulty appears to lie in drawing a certain conclusion from the application of the provisions

of the Law of Property Act, 1925, to existing conveyancing practice.

Before January 1, 1926, a lessee was in an unfortunate position, in that although he was not entitled to call for his lessor's freehold title, yet he was affected by any defects or flaws in such title, notwithstanding that he had had no opportunity of ascertaining what defects, if any, were present.

The relevant provisions of the Law of Property Act, 1925, are contained in section 44 (2), (8), (10) and (11).

By sub-section 2 of that section it is provided that: "Under a contract to grant or assign a term of years whether derived or to be derived out of freehold or leasehold land the intended lessee or assign shall not be entitled to call for the title to the freehold."

This would appear to leave the position of an intended lessee the same as hitherto where he takes his lease or assignment "under a contract", but sub-section 8 of that section provided in effect that "a purchaser" is not to be affected with notice of any matter or thing of which he might have had notice if he had in fact investigated the title or made inquiries in regard to matters prior to the period of commencement of title fixed by the Act or by any other statute or by any rule of law "unless he actually makes such investigation or inquiries". Sub-section 10 provides that the whole of the section applies to contracts for sale or exchange save where otherwise expressly provided, and sub-section 11 makes the section apply only subject to any contrary intention expressed in the contract.

So far the position appears to be simple; but the practical difficulties which have arisen do not appear to be solved by the statutory provisions quoted. It is admitted on both sides that "under a contract" a lessee cannot call for the freehold title.

One school of thought, however, points out that the doctrine of constructive notice as it was applied in practice under the Conveyancing Act of 1881 has never been completely done away with, and under that doctrine a Purchaser was bound by constructive notice of any defects of title which would have come to light in the course of any investigation which he "ought reasonably to have made". The words "ought reasonably" are referred to in Halsbury as meaning "as a matter of prudence having regard to what is usually done by men of business in similar cases".

The first school of thought, therefore, says that the solicitor for an intending lessee "ought reasonably" to inquire as to the freehold title, because if he does not do so he may be taking a

lease from a man who has no title whatsoever and in that case he would have no protection at all, as against the true owner of the land. If this is correct then the solicitor to the intending lessee should in all cases exclude from the contract to grant the lease the provisions of section 44, and if he does not do so he is not acting with a proper regard to his client's interests, and, therefore, it might be argued that if he did not exclude section 44 from the contract he would be affected by notice notwithstanding the provisions of that section.

The difficulty is accentuated when considering the position of a mortgagee and his professional adviser.

The mortgagee is not bound by any restriction of title and unless the protection of section 44 can be extended to the mortgagee his solicitor must, as a matter of prudence, insist on being supplied with an abstract of the freehold title and must investigate the title. In practice, of course, this expense falls upon the lessee so that the only effect of section 44 has been to throw the expense of an abstract of the freehold title on the lessee instead of on the lessor. On the other side it is argued that the words "under a contract" in sub-section 2 do not mean under a contract in writing enforceable by the Court, but would include also the verbal arrangements usually made between intending lessors and lessees, and shortly that the effect of these words is of very small consequence. It is also argued that the provisions of this sub-section are so contrary to the doctrine of constructive notice under the Act of 1881 that this doctrine must now be regarded as overruled, and reference is made to Hanbury's *Modern Equity*, which on page 45 assumes that a lessee has still no right to inquire into the title of his lessor. It is also observed that Maitland (citing *Jared* v. *Clements*) points out that there is danger in making unnecessary inquiries. From this point of view it is contended that a mortgagee of a lessee, who has the full protection of section 44, is in the position of a *bona fide* purchaser for value, and if he investigates the title which the lessee could properly call for, he is entitled as such *bona fide* purchaser for value to the benefit of the protection so afforded to his mortgagor by section 44; but, of course, it is appreciated that this view is correct only where a lessee is fully protected by section 44, *i.e.*, where he takes his lease "under a contract". Also it does not help a mortgagee who is in the unfortunate position of finding that his mortgagor's lessor had no title whatsoever to the property.

In practice, therefore, the solicitors acting for mortgagees usually insist on being supplied at the mortgagor's expense with abstracts of the freehold title (unless such title is well-known locally

and is known to be free from incumbrances) and solicitors are declining to approve a title as being good and marketable except in these circumstances.

It is appreciated, of course, that these comments apply more particularly with regard to newly created leases, and it is felt that in the case of leases which have been in existence for upwards of twenty years that the mortgagee's solicitors would neither be reasonable nor justified in asking for an abstract of the freehold.

Before the 1925 legislation one did know that one ran the risk of taking a lease from a person with a defective title, but the effect of the Acts in the numerous cases where there is no binding contract to take a lease seems to me simply to have confused the position.

For some time the writer took the view that adequate protection was afforded by section 44 of the 1925 Act, and that it was unnecessary to investigate freehold titles at all unless, indeed, there were suspicious circumstances. Latterly, however, it has been felt that with the position being far from clear it is very advisable to suggest to one's client, when acting for the lessee, that it is well worth his while to obtain an abstract of the freehold title, even though he may have to pay extra for it, or else, where the title is well known, to obtain a certificate of title from the lessor's solicitors.

The position is far from clear, and an authoritative statement or opinion would do much to help the general practitioner in justifying his advice to his clients in such cases.

Rent Restrictions Act, 1938.—A subscriber has raised a point of some interest in connection with Mr. L. A. Blundell's article in the last number of *The Conveyancer* on the Rent, etc. (Restrictions) Act, 1938. Mr. Blundell informs us that our subscriber is correct in saying that the registration provisions contained in section 2 (2) of the Act of 1933 and section 4 (1) of the Act of 1938 refer only to dwelling-houses let. An owner with vacant possession immediately prior to the passing of the Act of 1933 or 1938, whichever is the relevant Act, is not required to register although the dwelling-house is one to which the Acts would have applied but for section 2 of the Act of 1923. It is pointed out in the article referred to above, at p. 366, that the registration provisions of the 1938 Act apply only in respect of a dwelling-house let as a separate dwelling immediately before the passing of the 1938 Act.

Rent Restrictions Act, 1938—a difficult section.—Much difficulty is being caused in practice by section 7 (2) of the

Increase of Rent and Mortgage Interest (Restrictions) Act, 1938. That sub-section relates to permitted increases of rent corresponding to increases in rates. By section 2 (1) (b) of the Act of 1920 the increase permitted on that account is an amount not exceeding any increase in the amount for the time being payable by the landlord in respect of rates over the corresponding amount paid in respect of the yearly, half-yearly or other period which included the third day of August 1914. The House of Lords decided in *Nicholson* v. *Jackson* (1921), 90 L. J. K. B. 1121, that under this sub-section the comparison to be made was between the amount "paid" in August 1914 and the amount "payable" at the time when the rent was raised, both expressions being naturally to be understood as referring to payment in cash. The difficulty occasioned by the sub-section will be appreciated from the fact that the House of Lords was divided as to its proper interpretation. The majority decision of the House of Lords must be accepted, however, as the correct interpretation of the sub-section, except in so far as that decision is overruled by the 1938 Act. The particular issue raised in *Nicholson* v. *Jackson* was the question whether the amount of a compounding allowance made to the landlord could be counted part of the rates "payable" by him, and the House of Lords held that it could not be so counted.

The Act of 1938 now provides, by section 7 (2), that in computing an increase of rent under section 2 (1) (b) of the Act of 1920, the amount of any allowance made to the landlord under any of the enactments relating to allowances given where rates are paid by the owner instead of by the occupier *shall be treated as part of the amount payable by the landlord in respect of rates.* It has been widely assumed that this enactment makes the gross amount of the rates, including any compounding allowance, the comparable figure both for 1914 and for the time when the rent is raised. It is submitted, however, that this is not so, and that the true effect of the new provision, when applied to the Act of 1920 as interpreted in *Nicholson* v. *Jackson*, is that the comparison to be made for the purpose of calculating the permissible increase of rent is between the amount "paid" in 1914, as defined by the House of Lords (*i.e.*, paid in cash), and the amount "payable" when the rent is raised, as defined by the Act of 1938 (*i.e.*, including the amount of any compounding allowance). If this view be correct, then the rule in *Nicholson* v. *Jackson* is not wholly abrogated, but is only overruled in part. *Strood Estates Co.* v. *Gregory*, [1938] A. C. 118, is a decision as to the meaning of "net rent" and has no relevance at all to section 7 (2) of the new Act.

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THE LEASEHOLD PROPERTY (REPAIRS) ACT, 1938.

By Lionel A. Blundell, LL.M., Barrister-at-Law.

The object of the Leasehold Property (Repairs) Act, 1938, would appear to be the prevention of abuse by certain reversioners of repairing covenants in long leases. Such covenants are frequently drafted in a stringent form in order to secure the preservation of the demised premises in good condition. The practice aimed at is the service upon lessees of onerous schedules of dilapidations, not with the *bona fide* object of preserving the demised premises, but to embarrass the lessee so as to force him either to relinquish his lease or to purchase the reversion at an exorbitant price. The actual advantages conferred by the Act on a lessee served with such a schedule will be discussed below. It is proposed first to examine the provisions of the new Act and discuss their scope and some of their consequences.

(a) *Application of the Act.*

The Act only applies to covenants or agreements to keep or put in repair during the currency of a lease for a term of not less than twenty-one years a house of a rateable value of £100 or less. This limitation is expressly stated in respect of section 1 (1); the following sub-section is rather unhappily worded and refers back to " such a covenant as aforesaid " : while not clearly stated, it would seem that this does not mean simply a covenant to keep or put in repair, but is intended to apply to sub-section 2 also the limitation as to subject-matter, namely, a house of a rateable value of £100 or less.

The question at once arises what is and what is not a covenant to keep or put in repair, and this question is not so easy to answer as might at first sight appear. A simple covenant in such terms as " well and substantially repair and keep in repair " gives rise to no difficulty in this respect, but the lessee's covenants are frequently worded in much more ample form, and then difficulties are likely to arise. One may take, as an illustration, a covenant " well and substantially to repair, paint, glaze, cleanse, and keep in thorough repair and good condition all the said demised premises ". There are here a number of covenants all expressed in the one sentence, and they are to be construed as separate covenants : see the

judgment of Fletcher Moulton, L.J., in *Lurcott* v. *Wakeley*, [1911] 1 K. B. 905, at pp. 915 *et seq.* The tenant may, for example, fail to paint, to such extent that the woodwork suffers decay : he will then have committed breaches of four distinct covenants, namely, the covenant to repair, the covenant to paint, the covenant to keep in thorough repair and the covenant to keep in good condition. If the lessor serves a notice alleging a breach of the covenant to repair or of the covenant to keep in thorough repair, it is clear that the notice will fall under the provisions of the Leasehold Property (Repairs) Act, if the other circumstances bring the case within the scope of the Act. But the lessor may instead allege only a breach of the covenant to paint and a breach of the covenant to keep in good condition. Can it be said that these are covenants " to keep or put in repair " within the meaning of the Act? It may be doubted very much whether such covenants can be said to fall within that description. A covenant to paint is different from a covenant to repair; and " condition " does not mean the same as " repair ", although the same act or default on the part of the tenant may be a breach of both covenants. Of course the Act cannot be avoided by the transparent device of using some word other than " repair " which means the same thing, but obligations to paint and to keep in good condition are distinct in principle from an obligation to repair. Where the notice does not allege any breach of the covenant to repair, but alleges a breach of another covenant which is at the same time a breach in fact of the covenant to repair, it is difficult to say whether the Act applies or not. One may take also the case of a covenant to paint every seven years, etc., specifying other detailed requirements as to decorations. This is usually expressed entirely distinctly from the covenant to repair, and comprises much that is not included under a mere covenant to repair. It seems clear that a breach of a covenant to decorate, in a case where the act or default complained of is not a breach of the covenant to repair (the authorities as to what degree of painting, etc., is involved in the ordinary covenant to repair are too lengthy for discussion here), would be outside the terms of the new Act. But it is evident that numerous difficulties are likely to arise in practice as to what is a breach of a covenant or agreement to keep or put in repair, within the meaning of the Act, and considerations of space forbid anything more here than a brief indication of the type of difficulties which may arise in this connection.

The Act contains no definition of what is meant by the expression " house ". In the Public Health Act, 1936, " house " is defined as meaning a dwelling-house, whether a private dwelling-

house or not (section 343). This definition does not, of course, govern the Leasehold Property (Repairs) Act, but it would appear that "house" may be used here in a somewhat similar sense as indicating a dwelling-house, because by section 4 of the new Act it is provided that the application of the Act to a house shall not be excluded by reason only that part thereof is used as a shop or office, or for business, trade, or professional purposes. This does not conclusively determine the question what is a "house" for the purposes of the Act; the section does not define the word, but merely mentions something which is not to be excluded. Moreover, the Act affords no guidance at all upon the question what outbuildings or other premises are to be reckoned part of the house for the purposes of the Act. The Housing Act, 1936, provides that for the purposes of that Act "house" includes any yard, garden, outhouses, and appurtenances belonging thereto or usually occupied therewith, but the Leasehold Property (Repairs) Act is entirely silent upon this important question, so it will be for the Courts to decide what is included in the term.

The covenant or agreement must be to keep the house in repair or put it in repair during the currency of a lease (section 1 (1)) originally granted for a term of twenty-one years or more (section 7 (1)), of which five years or more remain unexpired (section 1 (1) and (2)). The expression "lease" includes an original or derivative underlease or other tenancy, and also an agreement for a lease where the lessee has become entitled to have his lease granted (section 7 (1)). It appears from the full title and from the general tenor of the Act that the Act only applies to covenants or agreements on the part of lessees, and not on the part of lessors, though this is not expressly stated.

The Act does not affect the validity of the covenant or agreement, but merely places restrictions upon its enforcement by a lessor against a lessee. For this purpose "lessor" includes an original or derivative underlessor, and the persons deriving title under a lessor; and "lessee" includes an original or derivative underlessee, and the persons deriving title under a lessee (section 7 (1)).

Furthermore, the Act has no application to a breach of a covenant or agreement in so far as it imposes on the lessee an obligation to put a house in repair that is to be performed upon the lessee taking possession of the premises or within a reasonable time thereafter (section 3). This exception may have important consequences in some cases. It is a well-established principle of law that a covenant to keep premises in repair means that the lessee must put them into repair if they are not in repair when the tenancy

begins (see *Proudfoot* v. *Hart* (1890), 25 Q. B. D. 42; *Payne* v. *Hayne* (1847), 16 M. & W. 541; and see *Woodfall* (23rd ed.), p. 756). This would appear to be an obligation "that is to be performed upon the lessee taking possession of the premises or within a reasonable time thereafter", within section 3 of the new Act. If, therefore, the house was out of repair when the lessee took possession, and the lessee who had agreed to keep it in repair never did put the house in repair, it would seem that the lessor can bring an action in respect of that breach of covenant at any time during the term, and will not be restricted by the new Act; whereas if the tenant has once put the house in repair but has subsequently allowed it to fall out of repair, so that he is in breach of covenant, the new Act would apply.

It is to be observed that the Act only affects proceedings to recover damages or to recover possession upon the ground of forfeiture. Any equitable remedies available to the landlord are left undisturbed, and are still in the discretion of the Court as heretofore. As a general rule, however, specific performance of a covenant to repair will not be ordered, damages being usually an adequate remedy (see *Woodfall* (23rd ed.), p. 791), nor will an injunction be granted in an ordinary case. But if serious damage of an irreparable nature were being caused as the immediate result of a breach of covenant, it would seem that an injunction should then lie, no other remedy being adequate, and in such case proceedings could be commenced at once claiming an injunction without the necessity for serving a notice under the Act. Attention must also be drawn to the retrospective action of the Act. By section 5 the Act applies to breaches occurring before or after its commencement. By section 1 (4) a notice, served under section 146 of the Law of Property Act, that relates to a breach of a covenant or agreement to keep or put in repair during the currency of the lease a house of a rateable value of £100 or less, "shall not be valid" unless it contains the particulars there specified. It may fairly be assumed that no notice served prior to the passing of the new Act contained the particulars required thereunder. Yet the Act, in all its provisions, will now apply retrospectively to the breach of covenant committed before the Act was passed. This would appear to invalidate any notice already served in such a case, with the necessary consequence of avoiding all proceedings taken thereunder. Such a result can hardly have been intended, and it may be that an alternative construction of the Act can be put forward to avoid the position suggested above. Considerations of space, however, prevent further examination of the question here.

(b) *Restrictions imposed on the enforcement of repairing obligations.*

Where a tenant has committed breaches of covenant to which the Act applies, he receives protection in the form of restrictions placed upon the landlord's common law right to enforce performance of the covenant. Under section 1 (2) the landlord cannot bring an action for damages for breach of the covenant while five years or more of the term of the lease remain unexpired, unless he has served on the lessee not less than one month (that is to say, a calendar month : see the Interpretation Act, 1889, s. 3) before the commencement of the action such a notice as is specified in section 146 (1) of the Law of Property Act, 1925; although when less than five years of the term remain unexpired, he may then bring an action in respect of earlier breaches.

The notice specified in section 146 (1) of the Law of Property Act, 1925, is a notice—

(a) specifying the particular breach complained of; and
(b) if the breach is capable of remedy, requiring the lessee to remedy the breach; and
(c) in any case, requiring the lessee to make compensation in money for the breach.

Under section 146 a notice in this form has generally to be served before the landlord can enforce a right of re-entry. The same kind of notice has to be served now, in cases to which the new Act applies, wherever the landlord wishes to recover damages for the breach of covenant. It should be observed that under the Law of Property Act the landlord cannot enforce his right of re-entry until the lessee has failed, *within a reasonable time* after service of the notice, to remedy the breach, if it is capable of remedy, and to make reasonable compensation in money, to the satisfaction of the lessor; a reasonable time may be either more or less than one month, according to the circumstances of the case. But where the Leasehold Property (Repairs) Act applies the lessee is given *one calendar month* during which *no action for damages* can be commenced. If, therefore, the lessee serves no counter-notice under the Act, the right to bring an action for damages and the right to enforce a forfeiture will not necessarily accrue at the same date. Further requirements of great importance as to the form of notice required by the Act are discussed below in section (c).

After service upon him of a notice in the form specified in section 146, the lessee has twenty-eight days within which he may serve a counter-notice to the effect that he claims the benefit of the Leasehold Property (Repairs) Act. This applies in the case of

all covenants to which the Act applies, whether the remedy sought by the landlord is damages or the enforcement of a right of re-entry. In the case of proceedings to enforce a right of re-entry, the effect is virtually to appoint a minimum period of twenty-eight days for the reasonable time which the lessee is allowed under section 146 for the remedying of the breach. If the lessee serves no counter-notice, then the landlord may commence proceedings in the usual way, unhampered any further by the Leasehold Property (Repairs) Act; in the case of a forfeiture action the lessee may still, of course, apply to the Court for relief against forfeiture. No special form is prescribed for the counter-notice.

Provisions as to the mode of service of both notice and counter-notice are discussed in section (c) below.

The effect of the service of a counter-notice is that, notwithstanding anything in any enactment or rule of law, no proceedings, by action or otherwise, may be taken by the lessor for the enforcement of any right of re-entry of forfeiture under any proviso or stipulation in the lease for breach of the covenant or agreement in question, or for damages for breach thereof, otherwise than with leave of the Court (section 1 (3)). "The Court" means the county court; except that where any proceedings by action for which leave may be given *would have to be* taken in a Court other than the county court, the expression "the Court" means in such case that other Court (section 6 (1)). By section 6 (2) jurisdiction is given to the county court under the Act, with the exception of the case mentioned above where proceedings by action for which leave might be given would have to be taken in a Court other than the county court.

The Court cannot grant leave for the purposes of the Act unless the lessor proves one or other of the requisites set out in section 1 (5). It is assumed here that the requisites specified are all intended to be read in the alternative, though only one "or" is inserted, namely, between paragraphs (d) and (e). In any case the Court has a discretion to refuse leave, the Act merely providing that leave shall not be given *unless* the lessor proves—

(a) "That the immediate remedying of the breach in question is requisite for preventing substantial diminution in the value of his reversion, or that the value thereof has been substantially diminished by the breach." This amounts practically to a requirement that the landlord shall prove his damage before he can commence his action for damages or for forfeiture. It will be remembered that the measure of damages for a breach of a repairing covenant is the amount by which the reversion is depreciated in marketable value by the premises being out of

repair (see *Woodfall* (23rd ed.), pp. 773-4 and the cases there cited). In a case to which the Leasehold Property (Repairs) Act applies, the lessor must, in effect, show, in order to get leave to proceed under this paragraph, either that the disrepair is such that he is already entitled to substantial damages or that unless the breach is remedied immediately the injury to the reversion will be such as to entitle him to substantial damages. The importance of the word "immediate" should be noted; if the diminution in the value of the reversion will not become substantial unless the disrepair is neglected for a long period of time, leave cannot be granted by the Court under this paragraph.

(b) "That the immediate remedying of the breach is required for giving effect in relation to the house to the purposes of any enactment, or of any byelaw or other provision having effect under an enactment, relating to the safety, repair, maintenance, or sanitary condition of houses, or for giving effect to any order of a court or requirement of a local authority under any such enactment, byelaw, or other provision as aforesaid." This preserves to the lessor his right (as controlled, however, by his contract of tenancy with the lessee) to have the house maintained up to the standard prescribed by public health and housing legislation and byelaws. In so far as any departure from the standard required is the result of a breach by the lessee of his covenant to keep or put the house in repair, that affords the landlord a ground for asking for the leave of the Court to take proceedings in respect of the breach. He must show that the *immediate* remedying of the breach is required for giving effect to the purposes of the enactment, byelaw, etc., or for giving effect to an order of a Court or requirement of a local authority thereunder. A breach of a byelaw occasioned by the tenant's breach of covenant entitles the lessor to ask leave of the Court whether or not the local authority has taken any action thereunder. To take another example, the Court may grant leave if the local authority has served a notice under section 9 of the Housing Act, 1936, requiring works to be executed which fall within the terms of the lessee's repairing covenant. Frequently, of course, notices served by local authorities under the Housing and Public Health Acts will be found to relate to matters of structural alteration lying outside the scope of the tenant's repairing covenant.

(c) "In a case in which the lessee is not in occupation of the whole of the house, that the immediate remedying of the breach is required in the interests of the occupier of the house or of part thereof." The expression "in the interests of the occupier" is vague and does not define exactly what interests of the occupier may be taken into account. It seems clear, however, that the

lessee's breach of covenant must interfere with the health, comfort and convenience of the occupier to such an extent that the "immediate remedying" of it can properly be said to be required in the interests of the occupier. A mere trivial interference with the comfort of a sub-tenant would not appear to require the immediate remedying of the breach in his interests.

(d) "That the breach can be immediately remedied at an expense that is relatively small in comparison with the much greater expense that would probably be occasioned by postponement of the necessary work." This is, perhaps, likely to be one of the more important cases in practice where application may be made to the Court to commence proceedings. Decay can often be arrested in its early stages at much less expense than may ultimately be incurred if it is allowed to run for a period of time. Wherever the landlord can prove that the case is one where postponement will probably increase greatly the expense of remedying the disrepair, the Court may grant leave under the Act.

Or (e) "Special circumstances which in the opinion of the Court render it just and equitable that leave should be given". This enables the Court to consider on their merits any special facts proved by the lessor; it is not possible yet to predicate with any certainty what circumstances may be regarded by the Court as sufficient to warrant leave being given. While the discretion conferred by this paragraph is very wide, it may be thought that in practice the Court will probably require very unusual circumstances to be shown before leave will be granted in a case which falls outside the scope of paragraphs (a) to (d).

The Court is given power by section 1 (6), in granting or in refusing leave, to impose such terms and conditions on the lessor or on the lessee as it may think fit. This, again, rests a very wide discretion in the hands of the Court. Leave may, for example, be refused on the terms of the lessee undertaking to execute certain repairs; or conditional leave might be granted, giving the lessee a further opportunity of remedying the breaches, instead of granting the lessor an unqualified leave to proceed. It would seem also that leave might be granted to bring an action for damages though not for forfeiture, if the circumstances warranted the exercise of the Court's discretion in that way.

Where a breach of covenant giving rise to a right of re-entry is, at the request of the lessee, waived by the lessor, or the lessee is relieved from the forfeiture under the provisions of the Law of Property Act, 1925, the lessor is entitled under section 146 (3) of that Act to recover from the lessee reasonable costs properly incurred in the employment of a solicitor and surveyor or valuer.

If, however, the case falls under the Leasehold Property (Repairs) Act and the lessee serves a counter-notice on the lessor, then, by section 2 of the new Act the lessor cannot recover any such costs until he has made his application to the Court for leave to proceed, and on that application the Court may direct whether and to what extent the lessor shall be entitled to the benefit of section 146 (3) of the Law of Property Act.

(c) *Provisions as to notices and counter-notices.*

A notice served under section 146 of the Law of Property Act, 1925, in respect of a breach of covenant to which the Leasehold Property (Repairs) Act applies, and a notice in the same form served under section 1 (2) of the new Act preparatory to bringing a claim for damages, must now comply with certain special requirements as to form. It is important to observe that those requirements must be observed, if the case falls within the scope of the new Act, whether the landlord desires to recover damages or to enforce a forfeiture. The notice must, by section 1 (4) of the new Act, now contain a statement, in characters not less conspicuous than those used in any other part of the notice, to the effect that the lessee is entitled under the Leasehold Property (Repairs) Act, 1938, to serve on the lessor a counter-notice claiming the benefit of that Act, and a statement in the like characters specifying the time within which, and the manner in which under the Act a counter-notice may be served, and specifying the name and address for service on the lessor.

A notice which fails to comply strictly with these requirements is wholly invalid, and therefore it is of great importance that practitioners should, in all cases to which the new Act applies, employ a form of notice which is strictly in accordance with the new provisions. In view of the highly technical form which the lessor's notice must now take under the new Act, a Form has been drafted and is printed on p. 475 in this number of *The Conveyancer*.

Under the new Act, the lessor's notice must not even bear any heading or opening words in characters any larger or bolder than those used for setting out the information required by the statute. It is, therefore, strongly to be recommended that the entire notice, headings included, should be printed or typed in a uniform type, with no words underlined or printed in large capitals and that if the notice be partly printed and partly typewritten, the printed part should be in characters the same size as those of the typewriter. In this way, inadvertent non-compliance with the Act may be avoided.

The notice must contain, first, the particulars required by section 146 of the Law of Property Act, 1925, and, secondly, the information specified in section 1 (4) of the Leasehold Property (Repairs) Act, 1938. The second requirement involves the necessity of setting out in the notice a statement of the manner in which, under the latter Act, a counter-notice may be served. This imposes a burden on the lessor because the mode of service is purely a matter of law. While on the one hand no special form is demanded for the lessee's counter-notice, the lessor has to comply strictly with requirements which involve technical details unlikely to be understood by a layman without professional assistance.

The manner in which under the Act a counter-notice may be served is governed by section 7 (2), which provides that the provisions of section 196 of the Law of Property Act, 1925, shall extend to notices and counter-notices required or authorised by the present Act. The provisions of section 196, so far as they are applicable to cases falling under the new Act, may be stated as follows :

(i) Any notice required or authorised to be served or given by the Act shall be in writing.

(ii) Any notice required or authorised by the Act to be served on a lessee shall be sufficient, although only addressed to the lessee by that designation, without his name, or generally to the persons interested, without any name, and notwithstanding that any person to be affected by the notice is absent, under disability, unborn, or unascertained.

(iii) Any notice required or authorised by the Act to be served shall be sufficiently served if it is left at the last known place of abode or business in the United Kingdom of the lessee, lessor, or other person to be served, or, in case of a notice required or authorised to be served on a lessee, is affixed or left for him on the land or any house or building comprised in the lease.

(iv) Any notice required or authorised by the Act to be served shall also be sufficiently served, if it is sent by post in a registered letter addressed to the lessee, lessor, or other person to be served, by name, at the aforesaid place of abode or business, and if that letter is not returned through the post-office undelivered; and that service shall be deemed to be made at the time at which the registered letter would in the ordinary course be delivered.

(v) This section does not apply to notices served in proceedings in the Court.

The question arises whether it is necessary, in order to comply with the requirement that the lessor's notice shall contain a

statement specifying the manner in which under the Act a counter-notice may be served, for the notice to set out in full the provisions of section 196 of the Law of Property Act so far as they are applicable to the service of a counter-notice. It may be suggested that a simple statement that the counter-notice may be served in the manner provided by section 196 of the Law of Property Act might suffice. It is thought, however, that this is inadequate and does not comply fully with the requirement that the manner in which it may be served must be specified in the lessor's notice. It is, therefore, advisable to specify at length the modes of service permitted under the Act. Furthermore, section 196 is merely permissive in form and does not exclude any mode of service already permitted under the law previously existing. To the statement of the manner in which the counter-notice may be served under section 196 must, therefore, be added a statement that the counter-notice may be served upon the lessor by handing it to him personally. Altogether the drafting of a valid notice in a case to which the Leasehold Property (Repairs) Act applies has become a highly technical matter, and the form printed among the Precedents should be referred to as showing the type of notice which is required.

(d) *General Observations.*

From the foregoing discussion of the provisions of the Leasehold Property (Repairs) Act, 1938, the reader will observe that this short Act of Parliament raises a considerable number of points of real difficulty. In the result it is extremely difficult to know the precise limits of the application of the Act and what its exact requirements are, and it may be anticipated that considerable confusion will, in practice, arise out of some of its provisions.

In an endeavour to protect tenants against harsh freeholders, severe restrictions have been placed upon the rights of landlords in general. It is not clear, however, how far the tenant has in law received a substantial benefit. In proceedings to enforce a forfeiture for breach of the covenant to repair, the Court has had, since 1882, a wide discretion to grant relief, which has always been exercised where the lessee was prepared fairly to perform his obligations. Under section 146 (2) of the Law of Property Act, 1925, "the court may grant or refuse relief, as the court, having regard to the proceedings and conduct of the parties under the foregoing provisions of this section, and to all the other circumstances, thinks fit." The object is, in the words of Earl Loreburn, L.C., in *Hyman* v. *Rose*, [1912] A. C. 623, at p. 631, "to prevent one man from forfeiting what in fair dealing belongs to someone

else, by taking advantage of a breach from which he is not commensurately and irreparably damaged." A more detailed statement of what must be done by the lessee to avoid a forfeiture was made by Cozens-Hardy, M.R., in the same case in the Court of Appeal (see [1911] 2 K. B. 234, 241; 80 L. J. K. B. 1011, 1017; and *Woodfall* (23rd ed.), at p. 423), and the rules then laid down were approved in the House of Lords as useful maxims in general. It is clear that the tenant was already well protected against a forfeiture based upon an exaggerated schedule of dilapidations.

In an action for damages the measure of damages is the diminution in the value of the reversion occasioned by the breach : so, provided the property were maintained in such condition that the reversion was not diminished in value, no damages would be recoverable. Vexatious actions for technical dilapidations have never been favoured, particularly during the currency of long terms. It is difficult, therefore, to see what hardship was cast upon the tenant under the existing law.

The outstanding effects of the new Act are the imposition of procedural difficulties upon landlords and the multiplication of legal proceedings by rendering necessary preliminary applications to the Court. Moreover, litigation may be temporarily increased until the Courts have decided some of the difficult questions arising out of the statute. No doubt, many problems will arise also over the form of notice adopted by less well-instructed landlords. As to the net result of the Act, doubt may be felt whether in some cases a bad tenant may not derive benefit therefrom, and in these circumstances some landlords may prefer to avoid the application of the Act, where possible, by employing terms for twenty years, renewable one or more times; at any rate, until greater clarity prevails with regard to the working of this piece of legislation.

INCOME TAX IN RELATION TO SOLICITORS.

By L. J. Stein, Barrister-at-Law.

Inquiries which have reached the Editor of *The Conveyancer* suggest that, without attempting any exhaustive survey of income tax law in relation to solicitors, it may be useful to summarise the effect of certain decisions which affect them.

Daphne v. *Shaw* (1926), 11 T. C. 257, was a case in which a solicitor claimed that, in computing his profits for the purposes of his Schedule D assessment, he was entitled to an allowance in respect of wear and tear and obsolescence of books forming part of his law library. The question which arose was whether the library could be considered to be " machinery " or " plant " within the meaning of Rules 6 and 7 of the Rules of Cases I and II of Schedule D. The solicitor contended that since the Rules in question are Rules applying to Case II as well as to Case I, the reference could not be exclusively to plant and machinery as used in a trade, but must be taken, in the case of a solicitor, to extend to his law library, which could properly be described as his plant or machinery for the purposes of his profession. This contention was rejected, it being held that the expressions " plant " and " machinery ", though not precisely definable, must be understood in their " ordinary common-sense meaning ", and that, so construed, they could not be taken to include a solicitor's (or a barrister's) law library.

An entirely different aspect of the question of deductions from profits was considered in *C. I. R.* v. *Hagart and Burn-Murdoch* (1929), 14 T. C. 433. The respondents were a firm of Writers to the Signet, who were in the habit of making advances to clients. They had made unsecured advances on a considerable scale to a company for which they acted. It subsequently became clear that these advances were irrecoverable, whereupon the respondents wrote off the loss in their profit and loss account and claimed it as a deduction in the computation of their profits for the purposes of their Case II assessment. The Commissioners allowed the deduction, but the House of Lords, affirming the decision of the Court of Session, held that the deduction was inadmissible on the broad ground that there was not a close enough connection between

the respondents' professional activities and the making of advances to clients to enable a loss in respect of such advances to be treated as a business expense. The following passage may be quoted from the speech of Lord Buckmaster (at p. 443) : " Lending money to clients may often be done by Writers to the Signet, but it is no essential and necessary part of their profession, and if a case ever arose in which it could be held that moneylending and the profession had become one and the same business, it would require a special finding of facts to that effect before the position could approach that of the cases quoted. Apart from this it is also true that as factors of an estate or for special purposes money may be advanced by Writers to the Signet under such conditions that its loss would be a proper element in determining the balance of profits and gains, but the facts as found here do not establish any of the special conditions necessary to blend these payments with that of the profession in which the appellants were engaged."

Lord Warrington (at p. 448) put the matter thus : " The finding of the Commissioners merely amounts to this, that these gentlemen had from time to time been willing under circumstances of which no particulars are given to oblige clients in need of money by making temporary advances. No doubt in so doing they were probably actuated by the feeling that it was good policy to keep on good terms with their clients and that to refuse to make advances of money might entail a loss of business, but I cannot think that on these findings there is any ground shown for holding that the advances in question were made for the purposes of the appellants' profession of Writers to the Signet."

Questions as to the tax position of a solicitor-trustee arose in *Jones* v. *Wright* (1927), 13 T. C. 221. A solicitor who was a trustee of a number of trusts had, in the customary manner, been authorised by the instruments creating them to make the usual charges for work done by him in the matter of the trusts. He had undertaken the routine administration of the trusts, but instead of charging specific fees for work done in that connection, he had in the case of each trust arranged with his co-trustees to receive a small sum per annum calculated as a percentage of the income of the trust investments. The solicitor's contention was that these sums fell to be treated as annual payments and not as professional earnings to be taken into account for the purposes of his Case II assessment. This contention failed. It was held by Rowlatt, J., that, notwithstanding that the solicitor was a trustee, the payments in question were by way of remuneration for services rendered by him in his professional capacity and must, as such, be included in the computation of his profits. Where payments

are authorised by the instrument creating a trust to be made to trustees as such, it was held in *Baxendale* v. *Murphy* (1924), 9 T. C. 76, that such payments are for tax purposes to be treated as annual payments receivable by the trustees under the trust, and not as payments received by way of remuneration. But in this case the payments were made to the recipient, not as a trustee, but as a solicitor. He could have been a trustee without acting as a solicitor; another solicitor could have been employed by the trustees. If, however, the solicitor-trustee elected to act as a solicitor and was remunerated for his professional services, the mere fact that the instrument creating the trust authorised such remuneration did not change its character. Nor did it make any difference that it was quantified in the form of an annual sum computed on a percentage basis; it was no more an annual payment within the scope of Rule 19 than is (to take the familiar illustration given by Scrutton, L.J., in *Howe* v. *C. I. R.* (1919), 7 T. C. 289) a lump sum per annum paid to a garage proprietor for the hire and upkeep of a car.

In *Watson and Everitt* v. *Blunden* (1933), 18 T. C. 402, a question was raised as to the tax position of a solicitor acting in the matter of a trust of which he was both a trustee and a beneficiary. The appellant, a practising solicitor, had, in partnership with other persons, purchased certain property, which was vested in him and another person as trustees. He was beneficially interested in the trust property to the extent of a four-ninths share. He acted as solicitor in all matters relating to the property and debited the trust in his books with the appropriate professional charges. He contended that four-ninths of those charges (corresponding to his beneficial interest in the trust property) should be excluded from the computation of his profits for the purposes of his Case II assessment, on the ground that to this extent he was merely paying costs, as a client, to himself as a solicitor. The costs were, of course, not actually debited against the beneficiaries but against the trustees, but what was really contended was that to the extent to which they fell to be ultimately borne by the appellant as a beneficiary, they should be excluded from his earnings as a solicitor acting for the trustees. It was held by the Court of Appeal, affirming the decision of Finlay, J., that the circumstance that the solicitor was himself a beneficiary of the trust was immaterial, and that there could be no question of dissecting his professional earnings with a view to ascertaining to what extent they could be said to represent charges falling to be ultimately borne by himself.

An important question as to the liability of solicitors to be

assessed under Rule 21 of the All Schedules Rules as the persons " by or through whom " a payment is made came before the House of Lords in *Rye and Eyre* v. *C. I. R.* (1935), 19 T. C. 164. The case arose out of the provisions of section 25 of the Finance Act, 1927, the effect of which is that, where the usual place of abode of the owner of a copyright is not within the United Kingdom, Rule 21 of the All Schedules Rules applies to any payment of royalties or any periodical payment in respect of that copyright as it applies to annual payments not payable out of profits or gains brought into charge. The appellants were a firm of solicitors acting for a client who had entered into an agreement with an author, through his agent, for a licence for the production of a play. The author's usual place of abode was not in the United Kingdom. On the signature of the agreement a certain sum became payable by the client as an advance on account of royalties. On the client's instructions, the solicitors, out of moneys in their hands at his disposal, remitted the sum due under the agreement to the author's agent abroad without deducting tax. Thereupon an assessment was made upon them under Rule 21. The House of Lords, affirming the judgments of the Courts below, unanimously decided that, whether or not the payments were made " by " the solicitors within the meaning of Rule 21, they were clearly the persons " through whom " the payments were made. The suggestion that the words " through whom " must be taken to refer to the person in consequence of whose instructions the payment was made was rejected by Lord Atkin as " contrary to the plain meaning of the words, which appear to me to indicate agency ". A question as to the meaning of the words " by or through whom " in Rule 21 in relation to a payment by solicitors arose with reference to mortgage interest in *C. I. R.* v. *Lawrence, Graham*, [1937] 2 All E. R. 1, but the case was disposed of without its being necessary to deal with this point.

RESTRICTIVE COVENANTS AFFECTING FREEHOLD LAND.

By C. H. S. Preston and G. H. Newsom,
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I. Introduction.

1. *Introductory.*

The expression "restrictive covenant" has come to bear a specialised meaning in the everyday language of lawyers which is at once wider and narrower than the words themselves connote. For it normally has reference to those restrictive agreements affecting freehold land which are enforceable not merely between the original contracting parties, or persons between whom there exists privity of contract, but also between the assignees of the pieces of land owned by the original parties at the date of the agreement, for the benefit of which, and for restricting the user of which, respectively, the contract was entered into.

It is with restrictive covenants in this sense that the present work is primarily concerned. But since no part of the law can be discussed in complete isolation from the rest, some treatment of connected subjects, and especially of covenants affecting leaseholds, will be incidentally necessary.

2. *Covenant.*

In its strict sense the word "covenant" connotes only a contractual obligation entered into by an instrument under seal, which was historically enforceable by the action of covenant. Such an obligation is at the present day merely a particular sort of contract, and, like other contracts, is enforceable only between a plaintiff and a defendant between whom there exists privity of contract, since "our law knows nothing of a *jus quæsitum tertio* arising by way of contract": *Dunlop* v. *Selfridge*, [1915] A. C. 847, *per* Lord Haldane, at p. 853.

But both law and equity permit extensions whereby some contractual obligations operate beyond this narrow field. For example, where a covenant is contained in a lease, privity of estate may be a substitute for privity of contract: see *infra*, § 6. Again, a designated person may take the benefit of certain sorts of covenant under Real Property Act, 1845, s. 5, and Law of

Property Act, 1925, s. 56 : see *infra*, § 8. And in certain cases equity will in effect confer the benefit of a covenant on a third party, by holding that the person entitled to enforce is a trustee of the covenant.

The expression "restrictive covenant" used in connection with freehold land refers to an obligation differing from a mere covenant. For, in the first place, a restrictive covenant is not necessarily a covenant at all : any contractual obligation, whether under seal or in writing (*a*), is a restrictive covenant if it restricts the user of the land of the promisor. Further, a restrictive covenant has the additional peculiarity that it is one which may be enforceable by and against persons between whom there is no privity of contract or of estate. Thus, if A, the owner of Blackacre and Whiteacre, conveys the latter to B, taking restrictive covenants for the protection of his retained land, C, an assignee of Blackacre, may well be able to enforce those covenants against D, an assignee of Whiteacre. It is for this reason that restrictive covenants are said to "run with the land" (*b*), which characteristic gives them their chief importance.

3. *Covenants, when collateral.*

A covenant cannot run with land unless it is for the benefit or protection of land. Consequently, a large number of covenants can be excluded at the outset of this inquiry, as having no connection at all with land. Such covenants are called personal covenants; a contract of service is an example of a purely personal covenant.

Some covenants, though having a more or less remote connection with land, may be incapable of running, because they

(*a*) But a restrictive covenant affecting freehold land cannot be created by parol. It is true that a collateral covenant, that is, one affecting land only remotely, is not within Statute of Frauds, s. 4, and Law of Property Act, 1925, s. 40 (1) : *Angel* v. *Duke*, L. R. 10 Q. B. 174; *Boston* v. *Boston*, [1904] 1 K. B. 124. But a covenant running with land is within Statute of Frauds, s. 3, and Law of Property Act, 1925, s. 53 (1) (a), and writing is therefore necessary.

As to a deed not being essential, see *Tulk* v. *Moxhay*, 2 Ph. 774, at p. 778, and note that it is a "covenant or *agreement*" which is registrable under Land Charges Act, 1925, s. 10, as a Class D (ii) land charge. Similarly, the Authority under Law of Property Act, 1925, s. 84 (1), can deal with "restrictions arising under a covenant *or otherwise*".

(*b*) This expression is often used loosely, as it is here and in Law of Property Act, 1925, s. 80 (4), to cover all cases where the benefit or burden of the covenant passes to persons subsequently becoming entitled to the land of the original covenantee or covenantor. Strictly, it should be confined to cases where the benefit passes at law as an appurtenance of the land of the covenantee upon an assignment of it. It is not properly appropriate to cases where the benefit passes by express assignment : *Re Union of London and Smith's Bank's Conveyance, Miles* v. *Easter*, [1933] Ch. 611, *per* Romer, L.J., at p. 636; or where the burden passes in equity : *Rogers* v. *Hosegood*, [1900] 2 Ch. 388, *per* Rigby, L.J., at p. 401.

are not of such a nature as to affect land in a sufficiently direct manner by enhancing its value or controlling its user (*c*). Such covenants are sometimes called personal covenants, but are more conveniently known as collateral ones, to distinguish them from those that are purely personal. A collateral covenant is frequently to be found in a lease, along with covenants not collateral. If, however, a covenant is not of its nature collateral, but is one which may run with land, it may in the circumstances be collateral, unless proper steps are taken to make it run. If it is to run there must always, of course, be land for it to run with, and the parties must intend that it shall run. It is vital to discover whether, in any given case, this intention is present. Thus, a covenant to repair, which is clearly not *per se* collateral, may yet be collateral in a case where the intention is that it shall bind only the covenantor: *Angel* v. *Duke*, L. R. 10 Q. B. 174; cf. *Osborne* v. *Bradley*, [1903] 2 Ch. 446 and *Re Fawcett and Holmes' Contract*, 42 Ch. D. 150. In the past the absence of the words "for himself and his assigns" after the description of the parties, and especially of the party bound, was often relied on as evidence of the lack of the necessary intention, though it was not in itself essentially fatal (*d*). But no such reliance is now possible in cases where they are implied by statute. They are so implied in every case of a covenant relating to land, after the description of the covenantee since 1882 (Law of Property Act, 1925, s. 78 (1), re-enacting Conveyancing Act, 1881, s. 58), and after the description of the covenantor since 1926 (Law of Property Act, 1925, s. 79 (1)). Nothing in these provisions, however, permits or requires a covenant to run if it does not otherwise do so: *Grant* v. *Edmondson*, [1930] 2 Ch. 24; [1931] 1 Ch. 1.

In construing a covenant to ascertain whether such intention exists regard must be had to the language and the surrounding circumstances of the case, but it is submitted that a strong context is required to negative the intention to run where the covenant is capable of doing so. In many cases, of course, the intention is expressly stated.

4. *Restrictive covenants.*

Further, though a covenant may be capable of running with land and may be intended by the parties to run, that intention

(*c*) See *infra*, II, §§ 6, 15; III, § 9 and Excursus B.

(*d*) But their presence implied, as a rule, no more than an intention to make the covenants run (*Powell* v. *Helmsley*, [1909] 1 Ch. 680; 2 Ch. 252), and did not amount to a warranty by the original covenantor as to the conduct of persons claiming under him: see *infra*, IV, § 2.

may or may not be achieved in the circumstances of any case. The second and third chapters of this work deal with the rules according to which the benefit and the burden of covenants affecting freehold land devolve upon persons other than the original covenantee and the original covenantor. Apart from the simple case where one party to the deed enforces a covenant against the other, covenants may be enforced under the statutory provision (dealt with in § 8 *infra*) by which a person not a party to the deed is treated in certain cases as if he were so, and, subject to the rules detailed in Chapters II and III, by or against persons on whom the benefit or burden has devolved. There are, however, two overriding considerations: (a) no covenant will be enforced save between the original covenantor and the original covenantee (including in the latter term persons statutorily entitled to enforce: see § 8 *infra*), unless it is for the *protection of land or an interest in land*. Thus, where the covenant affects freehold land, if the plaintiff is not the original covenantee he must have land "touched and concerned" (see II, § 6), or land "capable of being benefited" (see II, § 15), while if the defendant is not the original covenantor, the plaintiff must always have land "capable of enjoying the benefit of the covenant" (see III, § 9): *L. C. C.* v. *Allen*, [1914] 3 K. B. 642 (*e*); (b) no covenant will be enforced in the absence of privity of contract or of estate between plaintiff and defendant, unless *either* the defendant is the original covenantor (*f*), *or* the covenant is a restrictive one; that is, one requiring no positive act by the party bound: see III, § 6.

5. *Nature of a restrictive covenant.*

The juridical nature of the burden upon freehold land created by a restrictive covenant has been variously described. In *L. & S. W. Ry.* v. *Gomm*, 20 Ch. D. 562, at p. 583, Jessel, M.R., offered the alternatives: "either the extension in equity of the doctrine of *Spencer's Case* . . . or an extension in equity of the doctrine of negative easements". The former looks to the historical origin of the enforcement of covenants affecting freeholds, by an analogy, though rather a loose one, to the covenants in leases enforced under the rules: *Spencer's Case*, 5 Co. Rep. 17. The latter is a general description of the nature of a restrictive covenant, and, as such, has often been cited and approved. It indicates three features of

(*e*) There are a few statutory exceptions to this rule, as to which, see II, § 27.

(*f*) There is nothing to prevent the *benefit* of a positive covenant running: see *The Prior's Case*, apud *Spencer's Case*, 5 Co. Rep. 17; *Sharp* v. *Waterhouse*, 7 E. & B. 816; cf. covenants for title.

such a covenant: (i) that it is a burden on one piece of land for the benefit of another piece of land; (ii) that it is a negative, or restrictive, burden; and (iii) that the burden operates only in equity. Being a mere equity, such a covenant is subject to the invariable rule that where equities are equal the law prevails, and therefore risks defeat at the hands of a purchaser for value of the legal estate without notice.

Sir John Salmond's expression "equitable servitudes" is a similar description, but it is less closely defined, and suffers from the disadvantage that the word "servitude" is not an English law term but a Roman one (*g*).

There is, perhaps, also an analogy between the doctrines of restrictive covenants and of derogation from grant. Discussing the latter in *Browne* v. *Flower*, [1911] 1 Ch. 219, Parker, J., said: "But the implications usually explained by the maxim that no one can derogate from his own grant do not stop short with easements. Under certain circumstances there will be implied on the part of the grantor or lessor obligations which restrict the user of the land retained by him further than can be explained by the implication of any easement known to the law" (*h*). After citing examples, he continues: "In none of these cases would any easement be created, but the obligations implied on the part of the lessor or grantor would be analogous to that which arises from a restrictive covenant" (at pp. 225—226).

As a matter of theory it is, perhaps, difficult to say exactly what place restrictive covenants occupy in the legal scheme of things. In practice, however, it is submitted that they should be treated as *sui generis*; that is, as a class of rights and obligations bound by a special set of rules worked out by the Court for themselves alone. The analogies are undoubtedly useful, especially in dealing with cases not already covered by reported decisions, but at the present day they should be received with some reserve.

6. *Leaseholds and freeholds.*

Covenants affecting freeholds are to be distinguished from those contained in leases and affecting only the land demised. It will here only be necessary to discuss the cases upon covenants in leases where that branch of the law overlaps that regarding covenants affecting freeholds, as, for example, in connection with breach of

(*g*) In any case, no analogy is perfect, a point which does not seem quite to have been appreciated by Mr. Behan in his strictures upon the dictum of Jessel, M.R. ("Covenants affecting land", pp. 45—48).

(*h*) Cf. the obligation not to depart from a scheme of development imposed on a common vendor: see II, § 20.

covenant or where historically the two branches have become confused. The basic difference between the two sorts of covenant is plain. Leasehold covenants are enforced by and against persons other than the original covenanting parties by virtue of their respective possession of the term and the reversion in the *same* piece of land: the parties to the action have privity of estate, if not also of contract. Freehold covenants, on the other hand, are entered into to protect, and are enforced by virtue of the possession of, land *other* than that on which performance is to take place: the parties to the action may have privity of contract, but never have privity of estate: usually, indeed, they have neither.

Leasehold covenants, moreover, cannot be entirely excluded from consideration, because an important part of the law relating to freehold covenants, and in particular the expression "touching and concerning", to which reference is made later (II, § 6), has been derived from the leasehold rules laid down in *Spencer's Case*, 5 Co. Rep. 17. Further, there are cases where the plaintiff is unable to rely upon privity of contract or upon privity of estate to enforce a restrictive covenant in a lease; for example, a lessor can only sue an underlessee upon a restrictive covenant in a lease by virtue of the doctrine of *Tulk* v. *Moxhay*, 2 Ph. 774. Again, a lease may contain covenants to be performed by the lessor or the lessee upon adjoining land, not included in the demise (see II, § 7): or a covenant may be entered into to protect some interest other than a reversion on a term of years in the restricted land; for example, a rentcharge. In these circumstances, it is impossible to treat leasehold and freehold covenants as entirely distinct classes.

7. *Registration of restrictive covenants.*

A cross-division is, however, introduced by Land Charges Act, 1925, s. 10. The covenants registrable as Class D (ii) land charges are covenants and agreements other than covenants between lessor and lessee restrictive of the user of land. The excepted class, therefore, is not limited to covenants between lessor and lessee relating solely to the demised land, but includes covenants between lessor and lessee affecting other land, which are accordingly not registrable. This intermediate class of covenants, though they are contained in leases, must be dealt with on the principles applicable to freehold covenants (see *Ricketts* v. *Enfield Churchwardens*, [1909] 2 Ch. 544, and II, § 7), and it is therefore incorrect to assume that the distinction drawn above between leasehold and freehold covenants is identical with that drawn by the Land Charges Act, 1925, for the purpose of registration: see III, § 12.

8. *Statutory extension of benefit of covenants.*

By Real Property Act, 1845, s. 5 (replaced and extended by Law of Property Act, 1925, s. 56 (1)), the benefit of a covenant respecting land or other property may be taken by a person without his being named as a party to the deed containing it. Attempts have been made to give these sections a very wide scope, but it is now well settled that all that is aimed at is to put an ascertainable person (who might therefore have been a party to the deed) in as good a position as if he had been a party. On the one hand, therefore, no one is entitled to invoke this statutory provision as a ground for giving him the benefit of a covenant which it would be merely convenient for him to possess: *White* v. *Bijou Mansions, Ltd.*, [1937] Ch. 610; [1938] Ch. 351. "I interpret it as a section which can be called in aid only by a person in whose favour a grant purports to be made or with whom the covenant or agreement purports to be made": *ibid.*, *per* Simonds, J., at p. 625. Similarly, in *Kelsey* v. *Dodd*, 52 L. J. Ch. 34, Jessel, M.R., said: "You could no more covenant now than you could before, *simpliciter*, with the first son of A hereafter to be born." On the other hand, if the deed expressly confers it upon him, or upon persons of a description to which at the date of the deed he answers, he can enforce it himself, and can, like any original covenantee, act as a fountain-head whence others can derive titles to enforce the covenant. Thus in *Forster* v. *Elvet Colliery Co.*, [1908] 1 K. B. 629 (affd. *sub nom. Dyson* v. *Forster*, [1909] A. C. 98), a covenant with "owners . . . for the time being" of certain lands was held to be thereby annexed to land then vested in a predecessor in title of the plaintiffs. Similar consequences followed where a purchaser covenanted with the vendors and their successors "and as a separate covenant with their assigns owners for the time being of the land adjoining or adjacent to the said land hereby conveyed": *Re Ecclesiastical Commissioners' Conveyance*, [1936] Ch. 430. The covenantor thereby conferred the benefit of his covenant not only upon the vendors but also upon persons who had purchased nearby land from the vendors at an earlier date; and the covenants were enforceable by them and persons claiming under them. In this case it was held that the separate covenant must be with earlier assigns, because under Conveyancing Act, 1881, s. 58, and Law of Property Act, 1925, s. 78 (1), later assigns would have been within the principal covenant.

9. *Proceedings.*

The question whether a restrictive covenant affecting freehold

land is enforceable, and what it prohibits, may arise in various kinds of proceedings :

A. Actions for breach (*i*) and conversely actions for declarations that covenants are unenforceable : see VI, § 1 ff.

B. Actions relating to the title to the burdened land, and vendor and purchaser summonses : see VI, § 6 ff.

C. Statutory proceedings under Law of Property Act, 1925, s. 84, and Housing Act, 1936, s. 163: see VI, § 11 ff.

It will be convenient to treat of the questions concerned with the devolution of the benefit and burden as if they arose in an action for an injunction for breach of the restrictive covenant. The person who claims the benefit of it is therefore called the plaintiff, and the person whose land is alleged to be subject to its burden is referred to as the defendant. No action upon a restrictive covenant can succeed unless it is one between a plaintiff who has a right to enforce it, and a defendant who is liable to be sued upon it. Both these things have to be shown by the plaintiff; it is not enough to show that the plaintiff can sue someone, or that the defendant is liable to be sued by someone. Thus an action upon an enforceable covenant may fail because there is the wrong plaintiff or the wrong defendant. The failure of the action does not make the covenant unenforceable, though a declaration that it is unenforceable binds all the world if, and only if, it is obtained under Law of Property Act, 1925, s. 84 (2): see VI, § 30.

An action upon a restrictive covenant may arise between various combinations of parties :

1. *Where the plaintiff is the original covenantee and the defendant is the original covenantor.* Here the matter is purely one of the law of contract, as in that part of *L. C. C.* v. *Allen*, [1914] 3 K. B. 642, where the L. C. C. sued M. J. Allen.

A restrictive covenant may fail to be enforceable by reasons simply of contract law. For example, a man cannot covenant with himself; nor, till the rule was reversed by Law of Property Act, 1925, s. 82 (1), could he covenant with himself and others jointly. These rules were applied in *Ridley* v. *Lee*, [1935] Ch. 591, where a purchaser had prior to 1926 covenanted with the vendors (who were himself and two other persons owning land as tenants in common) to observe certain restrictive stipulations in circumstances which would have normally created a building scheme. In seeking to enforce these covenants the plaintiffs were in a

(*i*) Including motions to commit in such actions, as *e.g.*, in *Rolls* v. *Miller*, 27 Ch. D. 71. In that case the motion to commit was brought by agreement between the parties.

dilemma. If the covenants were several, there was no building scheme, because it could not then be said that they enured for the benefit of the entirety of the retained land, while, if they were joint, they were void *ab initio*. Luxmoore, J., held that the retrospective provisions of Law of Property Act, 1925, s. 82 (2), were insufficient to create in 1926 a building scheme which had been void in its inception at an earlier date.

2. *Where the plaintiff is the original covenantee but the defendant is a person other than the original covenantor who has the restricted land*, the question is one of equity, since at law the burden of a covenant never runs with freehold land: *Austerberry* v. *Oldham Corporation*, 29 Ch. D. 750, *infra* III, § 3. In equity anyone who has the restricted land for any interest is bound unless he is a purchaser for value of a legal estate without notice: *Tulk* v. *Moxhay*, 2 Ph. 774; *Re Nisbet and Potts' Contract*, [1905] 1 Ch. 391, [1906] 1 Ch. 378: see III, *passim*. Here, then, the plaintiff is entitled to succeed if, but only if, the defendant is liable to fail.

3. *Where the plaintiff is a person claiming the protected land under the original covenantee and the defendant is the original covenantor*, the question is whether the benefit of the covenant has passed to the covenantee's assign, whether running at law in the strict sense (*The Prior's Case* apud *Spencer's Case*, 5 Co. Rep. 18), or by express assignment, or in equity under a building scheme: see II, *passim*. In such a case, the defendant is clearly subject to the covenant, but the result of the action will depend upon whether the plaintiff is a person entitled to succeed.

4. *Between parties neither of whom is an original covenantee or covenantor*, two questions have to be answered, namely (a) whether the benefit has passed to the plaintiff, and (b) whether the burden has passed to the defendant: *Rogers* v. *Hosegood*, [1900] 2 Ch. 388; *Re Union of London and Smith's Bank's Conveyance, Miles* v. *Easter*, [1933] Ch. 611. In practice most cases take this form, but the main question is usually as to the plaintiff's right to enforce, as it is much easier to become liable to a covenant than to become entitled to its benefit.

10. *Arrangement of subsequent chapters.*

Chapter II deals with the devolution of the benefit of restrictive covenants; that is, with the plaintiff's right to succeed in the action.

Chapter III concerns the devolution of the burden; that is, the liability of the defendant. Three excursuses are attached to this chapter dealing with collateral matters.

In Chapter IV there is a discussion of the best means of drafting restrictive covenants, with a view to their enforcement after the land protected and the burdened land have either or both changed hands.

Chapter V deals with breach of covenant; that is, with the question what activities have or have not been held to be breaches of particular restrictive covenants.

Finally, in Chapter VI there is some account of the proceedings relating to restrictive covenants and the remedies available, whether under the ordinary practice of the Court or under special statutory provisions.

II. Benefit.

1. *Introductory.*

A plaintiff, other than the original covenantee, may be entitled to enforce the covenant in any one of three sets of circumstances.

A. He may be an assign of land to which the benefit of the covenant is annexed.

B. He may be an express assign of the benefit of the covenant, and of some or all of the land for whose protection it was taken.

C. He and the defendant may both own land subject to a scheme of development.

A. *Annexation.*

2. *Annexation.*

The benefit of a covenant is said to be annexed to a parcel of land in any case where it is entered into for the particular benefit of such land, and apt words are used to attach it to the land. Once there is an effective annexation, the benefit of the covenant is said to inhere in the land and pass as an appurtenance of it upon a conveyance, irrespective of whether any of the successive owners know of its existence, just as the right to an easement passes upon the conveyance of the dominant tenement: *Rogers* v. *Hosegood*, [1900] 2 Ch. 388.

3. *Modes of annexation.*

Annexation is generally achieved in one or other of two ways. The covenant is expressed to be for the benefit of and/or intended to run with certain land. Or it is made with the covenantee as owner for the time being of such land, and others claiming such land under him, as in *Rogers* v. *Hosegood*, *supra*, p. 389 (*a*).

(*a*) As to a covenant with "occupiers for the time being" see *infra*, § 27.

4. *The protected land.*

Once it is clear that the intention is that the covenant should be annexed to some land three further questions arise. First, it must be ascertained what the land is to which the covenant is annexed. Sometimes such land is fully defined by the instrument; for example, it may be "the land coloured green on the plan drawn on these presents". More frequently, words are used which state the characteristics possessed by such land, for example, the lands of the covenantee "adjoining or near to" the land restricted (*Rogers* v. *Hosegood*, [1900] 2 Ch. 388), or "adjoining or adjacent" (*Re Ecclesiastical Commissioners' Conveyance*, [1936] Ch. 430). Again, the covenant may be expressed to inhere in an estate of a certain name, for example, "the Childwickbury estate" (*Re Ballard's Conveyance*, [1937] Ch. 473), "the Calverley estate" (*Kelsey* v. *Dodd*, 52 L. J. Ch. 34), "the Swainston estate" (*Re Simeon*, [1937] Ch. 525); or an even less precise form may be adopted: "the Du Cane family estates at Streatham" (*Willé* v. *St. John*, [1910] 1 Ch. 84, 325); "the lands in . . . Redcar . . . now subject to the settlement" (*Zetland* v. *Driver*, [1937] Ch. 651; (1938), 54 T. L. R. 594). In such cases extrinsic evidence is admissible to explain the meaning of the words, and it is a question of construction in what lands the benefit of the covenant inheres.

5. "*The whole and each and every part.*"

Second, it must be determined, as a matter of construction of the annexing words, whether the annexation is to the whole of the land so ascertained, as a whole, or to the whole and each and every part. Often this question is easily resolved, owing to the presence of an express provision that the annexation is to each and every part. Such words are: "all *or any* of their lands" (*Rogers* v. *Hosegood*, [1900] 2 Ch. 388); "such part *or parts* of the lands subject to the settlement as shall, etc." (*Zetland* v. *Driver*, [1937] Ch. 651; (1938), 54 T. L. R. 594; "the said land *and every part thereof*" (*Re Ecclesiastical Commissioners' Conveyance*, [1936] Ch. 430); "so that every person for the time being entitled to any estate in *any such* lands shall have a right to the observance" (*Ridley* v. *Lee*, [1935] Ch. 591). But in the absence of any sufficient expression, very difficult questions of construction may arise. The rules followed by the Court are perhaps best stated in the judgment of Romer, L.J., in *Drake* v. *Gray*, [1936] Ch. 457, at pp. 464-5. Their effect is that, while the matter is one of construction, with the consequence that each case must be dealt with on its own words, it

is relatively easy for the Court to read in the words "every part or parts" where the annexation is to the "retained lands of the vendor", or lands thus generally described, while it is relatively difficult for those words to be read in where the annexation is to "the B estate" or lands thus specified as a single unit. For example, the words were read in in *Drake* v. *Gray* itself, where the annexation was to "the remaining hereditaments so agreed to be partitioned", but not in *Re Ballard*, [1937] Ch. 473, where it was to the "Childwickbury estate".

For two reasons the answer to this second question is of vital importance. In the first place, to anticipate a later section of this chapter (see *infra*, § 9), as the law now stands, if a covenant be annexed only to the whole of a piece of land it is not enforceable at all unless it "touches and concerns" such whole as a whole (*Re Ballard's Conveyance*, [1937] Ch. 473), while one annexed to each and every part may be enforced by any person who has a *part* which is "touched and concerned" (*Zetland* v. *Driver*, [1937] Ch. 651; (1938), 54 T. L. R. 594), even though some parts may not be "touched and concerned". The second reason for its importance is that if the annexation is to the whole, the only person capable of enforcing is one who substantially has the whole, and it will be a question of "the plain and ordinary significance" of the expression, *i.e.*, a question of fact, whether there is anyone at the date of the action who still has enough of the lands which constitute the B estate at the date of the instrument to be properly described as still the owner of such estate: *Everett* v. *Remington*, [1892] 3 Ch. 148. In *Re Ballard's Conveyance*, [1937] Ch. 473, the respondents succeeded on this point, though they failed on "touching and concerning". But where the annexation is to each and every part, any person having a part, however small, may enforce: *Drake* v. *Gray*, [1936] Ch. 451. It is submitted, however, that a piece of land may be too insignificant a part to support an action on a covenant (see *infra*, § 10).

6. "*Touching and concerning*".

The third question to be asked is whether the land to which the benefit is annexed, and which is now owned by the plaintiff, is "touched and concerned" by the covenant. This expression (*b*) is an ancient one, but, owing particularly to the decision in *Re Ballard*, [1937] Ch. 473, it is of great importance at the present

(*b*) The form "touched *or* concerned" is at least equally common. It is not, however, a term of art, and it appears to be immaterial which form is adopted.

day. References to it are to be found at intervals in the modern cases, at least since *Austerberry* v. *Oldham Corporation*, 29 Ch. D. 750. In order, however, to appreciate its significance correctly, it will be desirable to give some account of its history. Ultimately, it seems to be derived from *Spencer's Case* (1583), 5 Co. Rep. 17.

7. *Leaseholds.*

The rules laid down in that case govern the running of the benefit and burden of covenants entered into by the lessor and lessee of demised land with the term and the reversion therein respectively. They are partly common law rules, and partly those of 32 Henry 8, c. 34. For the application of these rules and the statutory amendments and additions thereto (*c*), it is necessary to ascertain whether the covenant in question touches and concerns the "thing demised". In almost all cases an affirmative answer can be given to this question if the covenant requires some act or forbearance upon the demised land; apart from the special cases mentioned below, covenants between lessor and lessee have not been held to run unless they touch and concern the land in this direct manner. Thus in *Woodall* v. *Clifton*, [1905] 2 Ch. 257, and *Bradbury* v. *Grimble*, [1920] 2 Ch. 549, an option to purchase the freehold reversion was held not to run; *a fortiori* an option to purchase an adjoining freehold: *Collison* v. *Lettsom*, 6 Taunt. 224; in *Dewar* v. *Goodman*, [1909] A. C. 72, a covenant by an under-lessor of two houses to repair the other 209 houses comprised in the headlease, so as to save the whole holding from forfeiture, was held not to run. In such cases the distinction to be observed is that the covenant may well affect the estate of the covenantee in the thing demised but not the thing demised itself. Again, in *Thomas* v. *Hayward*, L. R. 4 Ex. 311, where a lessee covenanted to use the demised premises as a public-house and the lessor covenanted not to open a public-house within half a mile, the latter covenant was held only to affect the particular user of the demised premises provided for by the lease, and not the land itself. The covenant therefore did not run. In a certain number of leasehold cases, however, "touching and concerning" has not been so narrowly interpreted. For example, in *Ricketts* v. *Enfield Churchwardens*, [1909] 1 Ch. 544, the lessor covenanted to observe a building line on a plot adjoining the land demised. This covenant was held to touch and concern the thing demised so as to run, notwithstanding that its performance was

(*c*) 32 Hen. 8, c. 34, was replaced by Law of Property Act, 1925, ss. 141, 142. Law of Property Act uses the expression: covenant having "reference to the subject matter of the lease".

necessarily elsewhere than on the demised land (*d*). There are also two cases in which lessee's covenants were likewise held to touch and concern the thing demised in this indirect manner. In *Vyvyan* v. *Arthur*, 1 B. & C. 410, the covenant was to take all corn grown on the demised land to be ground at the lessor's adjoining mill; and in *Sampson* v. *Easterby*, 9 B. & C. 505 (affirmed in the Exchequer Chamber, 6 Bing. 644), it was to build a smelting-mill on land of the lessor not included in the demise. The latter decision is the more remarkable in view of the fact that a covenant to build a house on other land of the lessor was given as an example of a covenant merely collateral in *Spencer's Case*. It may perhaps be explicable on the ground that the lease, which was one of mines, also provided that the lessee was to have possession of all smelting-mills on the lessor's lands. The importance of these exceptional cases for the present purpose lies in the fact that the indirect manner in which the requirement of "touching and concerning" was fulfilled is exactly like that in which the same requirement is applied to covenants affecting freeholds.

8. *Freeholds.*

The position in regard to freehold covenants is as follows: since the covenantee has no interest in the restricted land it is neither necessary nor possible for him to claim to enforce the covenant on the ground that it touches and concerns land in which both he and the covenantor have interests. It must be enforced either as a direct contract, *i.e.*, by the original covenantee against the original covenantor, or upon the footing that it enures for the benefit of protected land to which it is annexed. It is this protected land which must be touched and concerned by the covenant if the covenant is to be enforced by successive owners of it. It is therefore clear that this "touching and concerning" cannot be of the kind required in the cases where the requirement was strictly applied to leasehold covenants. This view of the matter first emerged in *Rogers* v. *Hosegood*, [1900] 2 Ch. 388 (*e*), and it is instructive to compare with that case the judgments in *Austerberry* v. *Oldham Corporation*, 29 Ch. D. 750. There were ample grounds

(*d*) Cf. *Holloway Bros.* v. *Hill*, [1902] 2 Ch. 612; *Wilkes* v. *Spooner*, [1911] 2 K. B. 473; *Stuart* v. *Diplock*, 43 Ch. D. 343. See III, Excursus B, §§ 4, 5.

(*e*) See *per* Warmington, Q.C., arguendo, at p. 399: "Touching or concerning" the land means *physically* touching or concerning it; not merely that the covenant is for the benefit of the land. In the present case the covenant relates to that which is to be done or not to be done upon the land of the *covenantor*, not of the *covenantee*." This argument was disposed of by the Court of Appeal, at p. 404, where it was said "the benefit of the two covenants in question was intended for . . . (among others) the plot of land acquired by Sir John Millais, and that they touched and concerned that land within the meaning of those words so as to run with the land at law we do not doubt".

for the latter decision, but upon one part of the case the view was expressed from the Bench that the benefit of the covenant to repair a road, which was the covenant sued upon, could not run with A's land, because nothing was to be done upon A's land. Such an attitude was a survival from the cases upon leaseholds, but it is now clear from *Rogers* v. *Hosegood* that this older view of "touching and concerning" has been abandoned, and that the protected land can be touched and concerned by performance taking place upon the restricted land. Similarly, where no such annexation exists, but the plaintiff claims as express assignee of the benefit of the covenant, he must have ascertainable land capable of being, and intended to be, benefited (see *infra*, §§ 11—15). This is an analogous requirement.

The meaning of the expression "touching and concerning" in connection with freehold land has seldom been discussed. But it seems to be generally agreed that the statement of Farwell, J., in *Rogers* v. *Hosegood*, [1900] 2 Ch. 388, at p. 395, is complete. He says: "Adopting the definition of Bayley, J., in *Congleton Corporation* v. *Pattison*, the covenant must either affect the land as regards mode of occupation, or it must be such as *per se*, and not merely from collateral circumstances, affects the value of the land." It is true that, in *Kelly* v. *Barrett*, [1924] 2 Ch. 379, Tomlin, J., remarked that whatever the test might be it was not, in his opinion, the test of increased value. But the definition in *Rogers* v. *Hosegood* was impliedly accepted by Clauson, J., in *Re Ballard*, [1937] Ch. 473, at pp. 480-1, and expressly adopted by Bennett, J., in *Zetland* v. *Driver*, [1937] Ch. 651, at p. 660. The expression "touching and concerning" therefore seems to mean in regard to freeholds no more than this: the protected land itself must be itself affected by the observance or non-observance of the covenants. On the one hand it is not enough that some personal advantage can be derived therefrom by successive owners. On the other it is not directly material where performance is to take place. In considering this question the content of the covenant itself is material: some covenants are obviously capable of affecting wider areas than others.

9. *Re Ballard and Zetland* v. *Driver.*

The importance of the requirement of "touching and concerning" has recently been brought out by the two cases of *Re Ballard's Conveyance*, [1937] Ch. 473, and *Zetland* v. *Driver*, [1937] Ch. 651; (1938), 54 T. L. R. 594.

In *Re Ballard*, the covenants were imposed by the following form of words: "the said Herbert Cassin Wright doth hereby

covenant with the said Emily Harriett Ballard her heirs and assigns and successors in title owners from time to time of the Childwickbury Estate of the said Sir John Blundell Maple that he the said Herbert Cassin Wright his heirs and assigns will perform and observe the conditions and stipulations set forth in the Schedule hereto."

The scheduled stipulations, which related to a piece of land about eighteen acres in size on the fringe of the Childwickbury Estate, made detailed provision for securing that the eighteen acres should be used for the purpose of substantial dwelling-houses only. The case arose upon an application by the then owner of the restricted land for a declaration under Law of Property Act, 1925, s. 84 (2), that the covenants were unenforceable. The assignees of the Childwickbury Estate were the respondents.

The learned Judge held as follows:—

(i) A certain area of land about 1,700 acres in extent, which had been vested in the covenantee, and was then vested in the respondents, was the Childwickbury Estate.

(ii) Annexation was to the whole Childwickbury Estate only, and not to each and every part of it.

The respondents do not appear to have argued the contrary, and in view of the remarks of Romer, L.J., in *Drake* v. *Gray* referred to above, it would have been difficult for them to do so successfully.

(iii) "It appears to me quite obvious that while a breach of the stipulations might possibly affect a portion of" (the 1,700 acres) "in the vicinity of the applicant's land, far the largest part of this area of 1,700 acres could not possibly be affected by any breach of the stipulations" (at pp. 480-1).

Clauson, J., considered the evidence of experts admissible upon the question "whether a breach of the stipulations or some of them might affect the whole of this large area" (at p. 481); but the respondents were unable to obtain any evidence to that effect.

(iv) It followed from the first three findings that the Childwickbury Estate was not touched and concerned by the covenants, and that accordingly they were unenforceable by the respondents.

The scope of this decision appears to be somewhat limited. In *Re Ballard* the land sought to be protected was a very large area, and there was no express annexation to each and every part of it. Nor was there any ground for reading in such annexation. It is, therefore, at most, an authority for the proposition that annexation to a whole, as a whole, is only effective to make the covenant run, if the whole is touched and concerned; the touching and concerning of some parts is insufficient to make the annexation effective.

It is, however, by no means certain that even this narrow

proposition is in accordance with principle. The first three findings of Clauson, J., are clearly unexceptionable, and the only question is whether the decision he came to really follows from these three findings (see (iv), *supra*). The exact ground upon which Clauson, J., based this part of his decision is as follows: "As I have not been referred to and I cannot find any authority for the proposition that a covenant which it has been sought to annex to a particular area of land can be enforced by the person seised of that land, not being the original covenantee, in a case where it cannot truly be said that the covenant touches or concerns the land to which it was sought to annex it, I must hold that the attempted annexation has failed and that the covenant has not been effectually annexed to the land and does not run with it" (at p. 482). The point not fully dealt with is therefore this: it might well be supposed that, if some parts of a whole are injuriously affected by a breach, the whole would also be injured. An obvious analogy is to the human body, or any other organism. Moreover, the unity of the whole must be stressed in that part of the case dealing with the annexation (see (ii), *supra*); the more it is insisted that the annexation is to the whole, the greater insistence must be placed on the intimacy of the connection between the whole and each and every part of it. No doubt it is the case that a covenant, annexed to the whole only, would cease to be enforceable when the whole is split up; but so long as the whole remains a whole there seem to be good grounds of principle for supporting the annexation to the whole by the fact that parts are injuriously affected.

Clauson, J., however, held that "far the largest part" of the 1,700 acres would not be affected (see (iii), *supra*). It may well be, therefore, that he thought that the whole could not be said to be affected where only some insignificant member was so, but that his view would have been different had it been "far the largest part" which would be affected, and only a small fraction which would not. This view of the case has the advantages of conceding the point of principle referred to in the last paragraph, and of basing the decision upon a finding of fact that in that case the affected parts were so small that they were insufficient to represent the whole, which could be said to be unaffected in spite of their being affected.

However that may be, the case of annexation to the whole, and only the whole, is comparatively rare. In the vast majority of cases the annexation is, either expressly or by implication, to the whole and every part, as in *Zetland* v. *Driver*, [1937] Ch. 651; (1938), 54 T. L. R. 594. In that case the words of annexation were "the purchaser to the intent and so as to bind as far as practicable

the said property hereby conveyed into whosesoever hands the same may come and to benefit and protect such part or parts of the lands in the Borough Township or Parish of Redcar, in the North Riding of the County of York, now subject to the settlement (a) as shall for the time being remain unsold or (b) as shall be sold by the vendor or his successor in title with the express benefit of this covenant, covenants ", etc. Bennett, J., considered the case as absolutely covered by *Re Ballard*, by which he declared himself bound, since " to do otherwise would only be to make the law relating to the enforcement of restrictive covenants more uncertain than it already seems to be " : [1937] Ch. 651, at p. 661. The Court of Appeal, however, reversed the decision of Bennett, J., contenting itself with distinguishing *Re Ballard*. In *Re Ballard* the annexation was to the whole of the C Estate, but in *Zetland* v. *Driver* it was to " such part or parts ", etc., of the protected land. Since one part of such land was a continguous close, it was impossible to argue that no part was affected; and since the case was distinguishable from *Re Ballard*, it was unavailing for the defendant to rely upon the plain fact that many parts, and the whole as a whole, were unaffected.

Where the annexation is to the whole and every part, and where some parts are not affected, the position is: (i) the estate owner of the whole cannot, as such, enforce the covenant; (ii) similarly the estate owner of such parts as are not affected cannot enforce, but (iii) the estate owner of a part which is affected can enforce, since the annexation was not only to the whole, but to every part. Where, however, the annexation is to the whole only, the judgment of the Court of Appeal in *Zetland* v. *Driver* does not affect the position. In that case the estate owner of the whole cannot enforce unless the whole, as a whole, is touched and concerned. This will certainly not be so where most of the land is not touched and concerned, and may not be so unless every single part is touched and concerned, though *Re Ballard* is not clear authority for more than the first point.

10. *The land touched and concerned.*

It is further obvious that if the plaintiff is to establish that he has land which is in fact touched and concerned by the covenant, that which he has must be such as in itself is capable of being so touched and concerned. For example, " it is plain that the benefit of a covenant restrictive of the user of land in Clapham cannot be annexed to land, say, at Hampstead ": *Kelly* v. *Barrett*, [1924] 2 Ch. 379, *per* Tomlin, J., at p. 395. But even if the land

restricted and the land sought to be protected are adjacent, the latter may be of such a character as to be incapable of being touched or concerned, either at all, or by one or more of the covenants imposed. Thus, in *Kelly* v. *Barrett*, a covenantor covenanted with A his heirs and assigns as owners of the site and soil of a certain road on which the restricted land abutted. At the date of the covenant the road was already dedicated to the use of the public, but had not been taken over by the local authority. Shortly afterwards it was so taken over, with the consequence that, either under the Metropolis Management Act, 1855, or the Public Health Act, 1875, there became vested in the local authority "so much of the actual soil . . . as might be necessary for the purpose of preserving, maintaining and using it as a street": *per* Tomlin, J., at p. 396. On these facts Tomlin, J., said that he saw no reason why there should not have been an effectual annexation in the first place, but that the successor in title of A could not now succeed "since he cannot to-day show that the surface of the avenue is vested in him, or that he sues to-day in respect of the estate or interest which belonged to his predecessor, or that the restrictions touch and concern such land as he now has". The Court of Appeal approved the decision of the learned Judge on this point, which was fatal to the claim. But Warrington, L.J., appeared to doubt whether the covenant ever attached at all. At pp. 410—11 the learned Lord Justice said: "Tomlin, J., has held that the site and soil of the road was land to which the benefit might in law be attached, and I take it that the question to be determined in all such cases is: may the land to which the benefit purports to be attached be reasonably regarded as capable of being affected by the performance or the breach of the obligation in question, as the case may be? I am not prepared to differ from Tomlin, J., on this point. I think it may be that a reasonable person could come to the conclusion that A, as the owner, as he then was, of that strip of land which is called the site and soil of Fitzjohn's Avenue, might be affected by the performance or non-performance of the obligation; that may be so." One may respectfully agree with the doubts here expressed, since it is not easy to see how the owner of a strip of land, already subject to a public right of way, could possibly be affected by the breach of any ordinary covenant on the adjacent land.

The question which Warrington, L.J., said should be put is, however, illuminating. For it shows that one should consider in each case whether the land which the covenants purport to protect can be in any way touched or concerned by any or all of the covenants. The point has not formed the subject of any reported

decision, but there may well be land sufficiently trivial in area or valueless in quality as to be incapable of being touched or concerned by any restrictive covenants at all. Again, any given piece of land may be incapable of being touched or concerned by any given covenant, though capable of being so affected by other covenants. For example, there can be few covenants which could conceivably affect an area of mountainous country covered with screes, or a tract of marsh-land subject to frequent inundation by the sea. Again, it is a common practice for the vendor of a building estate to retain a small strip of land, perhaps along the edge of one of the roads, so as to give him a *locus standi*, after he has parted with substantially the whole estate. It is not easy to suppose that such a piece of land is capable of being touched or concerned by ordinary building covenants; and consequently the vendor cannot rely upon it to support an action on them (for the estate or interest required by the original covenantee and by the plaintiff, see *infra*, §§ 27, 28).

B. *Express Assignment.*

11. *Express Assignment.*

Zetland v. *Driver*, [1937] Ch. 651; (1938), 54 T. L. R. 594, exhibits one special peculiarity. The covenants were not unconditionally or permanently annexed to the retained land, but only to either such part thereof as remained unsold, or to such as had been sold by the vendor or his successors in title with the express benefit of the covenant. On a sale by the vendor or his successors in title under the settlement, therefore, the benefit of the covenants would cease to be annexed to the land sold, unless such benefit was expressly assigned. But once it was so assigned it would be permanently annexed by the fulfilment of the condition specified in the deed, and no further assignments of its benefit would be necessary. *Zetland* v. *Driver* is therefore a case of annexation, subject to unusual machinery, and differs from cases of express assignment, since in the latter the benefit must be assigned on each change of ownership.

In the absence of annexation, the plaintiff may succeed if he is an express assign of the benefit of the covenant, subject to certain rules which are now crystallised in the judgment of the Court of Appeal in *Re Union of London and Smith's Bank's Conveyance, Miles* v. *Easter*, [1933] Ch. 611.

12. *Miles* v. *Easter.*

Those rules are summarised in the headnote to the report of that case, which is as follows: " Where, on a sale otherwise than under

a building scheme, a restrictive covenant is taken the benefit of which is not on the sale annexed to land retained by the covenantee so as to run with it, an assign of the covenantee's retained land cannot enforce the covenant against an assign (taking with notice) of the covenantor unless he can show (i) that the covenant was taken for the benefit of ascertainable land of the covenantee capable of being benefited by the covenant, and (ii) that he (the covenantee's assign) is an express assign of the benefit of the covenant" (*f*).

These rules may be further split up into the following requirements:—

13. "*Ascertainable land*".

1. The covenantee must have had "ascertainable" land at the date of the covenant. If he had no land at all, even the original covenantee will fail against an assign of the covenantor, though not, of course, against the covenantor himself: *Formby* v. *Barker*, [1903] 2 Ch. 539; *L. C. C.* v. *Allen*, [1914] 3 K. B. 642. "No land" means, of course, no land in the neighbourhood; the L. C. C. presumably owned some land, for example, their offices. If the covenant is imposed by a vendor and contained in a conveyance, made in pursuance of a contract which provided that the conveyance should contain such a covenant, the material date is that of the conveyance: *Millbourn* v. *Lyons*, [1914] 1 Ch. 35; 2 Ch. 231, where the covenantee had parted with all his land between contract and conveyance.

The ascertainable land must be ascertained with a high degree of precision, since in *L. C. C.* v. *Allen*, [1914] 3 K. B. 642, Scrutton, J., spoke of such land as "certain": see also *per* Romer, L.J., in *Miles* v. *Easter*, at p. 631. The manner in which it is to be ascertained is therefore exceedingly important. The better view is that the land must be defined in the document imposing the restriction, including documents incorporated therein by reference, but excluding other documents of title, and parol evidence. Once a satisfactory description of the land has thus been arrived at, parol evidence is admissible, if necessary, to prove what land is to be included in the description; for example, what are the boundaries of a named estate. But, though the matter is not entirely free from doubt, the primary description must be found in the document imposing the restriction.

(*f*) Apart from the leading cases discussed in the text *infra*, the doctrine of *Miles* v. *Easter* seems seldom to have operated. *Powell* v. *Hemsley*, [1909] 1 Ch. 680; [1909] 2 Ch. 252, was apparently an example. But, since the burden and not the benefit was the substantial matter in issue, the report does not direct itself very clearly to the point.

Thus in *Renals* v. *Cowlishaw*, 9 Ch. D. 125; 11 Ch. D. 866, the plaintiff failed on two grounds. There was no annexation, and he could not show any express assignment. But even had he done so, the conveyance containing the covenant failed clearly to identify the protected land. It was made by trustees who owned the Mill Hill Estate, but the only reference to that estate was in the identification of a particular road as leading " to the Mill Hill house and property belonging to the said trustees ". James, L.J., said: " There must be something *in the deed* to define the property ": 11 Ch. D., at p. 868. This was a particularly strong case, because, as Sargant, J., pointed out in *Ives* v. *Brown*, [1919] 2 Ch. 314, at p. 322, there could have been no difficulty in ascertaining what lands constituted the Mill Hill Estate, had the deed contained an adequate reference to it. In *Ives* v. *Brown* itself, the conveyance is stated in *oratio obliqua*, which leaves its wording ambiguous; the statement is that " the piece of land, with the workshops, stables and buildings *forming part of the Branksome Estate*, and known as 14 Wharf Road " was conveyed. It must be assumed that the italicised words were found in the deed. Neither *Chambers* v. *Randall*, [1923] 1 Ch. 149, nor *Northbourne* v. *Johnston & Son*, [1922] 2 Ch. 309, give any assistance on this point. In *Re Rutherford's Conveyance*, [1938] Ch. 396, Simonds, J., took the strict view. There Sir W. Rutherford contracted to sell all his land at Walton to Davies. Before completion, Davies contracted to sell part of such land to Sir K. Goadby. The two contracts were completed on the same date. Rutherford conveyed Goadby's part to him, Davies being a party. This deed contained covenants by Goadby, but the deed also contained inconsistent expressions as to the land to be benefited. Then Rutherford conveyed the rest to Davies. Simonds, J., was unable to find ascertainable land: " with whom am I to imply a covenant or agreement, and *in what capacity?* " (at p. 405).

A conflict of judicial opinion appears, however, in *Miles* v. *Easter*. Bennett, J., followed the line of authority referred to, and said at p. 625 that the assignee must satisfy the Court that the deed defines, or contains something to define, the property for the benefit of which the covenant was entered into. On the other hand, Romer, L.J., said at p. 631: " Although the Court will readily infer the intention to benefit the other land of the vendor, where the existence and situation of such land are indicated in the conveyance, or *have been otherwise shown with reasonable certainty*, it is impossible to do so from vague references in the conveyance or in *other documents* laid before the Court as to the existence of other land of the vendor, the extent and situation of which are undefined."

The learned Lord Justice was apparently prepared to look at other documents. Moreover, the question arose with others in *Re Heywood's Conveyance*, [1938] 2 All E. R. 230, where Simonds, J., said at p. 234: "Am I justified in saying that the land for the benefit of which the covenant was imposed is easily ascertainable, *or* can I infer from the face of the document what is the land for the benefit of which the covenant is intended to be imposed? I cannot possibly do so." If the learned Judge intended the word "or" to be disjunctive, this *dictum* supports the view that easy ascertainment *aliunde* is permissible. He seems, however, to have taken the strict view in *Re Rutherford's Conveyance*.

If the ascertainment must necessarily rest upon some definition in the conveyance itself, the field of the doctrine in *Miles* v. *Easter* is considerably limited. On the one hand, an expressed intention to benefit defined land generally amounts to annexation. On the other, casual mention of land, however clearly defined, is insufficient: *Renals* v. *Cowlishaw*. There remains, therefore, little but the class of case in which the burdened land is described as part of a named estate, as was probably the case in *Ives* v. *Brown*. The strict rule does, however, seem to be the more convenient, since once evidence *aliunde* is admitted, there are no bounds to it. For instance, a conversation between a vendor and a purchaser would be no less admissible than the earlier or later documents of title.

14. *Intention to benefit the land.*

2. There must be an intention to benefit the ascertainable land. This intention will, however, be readily inferred by the Court if the foregoing requirements are fulfilled: *Miles* v. *Easter*, [1933] Ch. 611, *per* Romer, L.J., at p. 631.

15. *Capacity of the land to be benefited.*

3. Some or all of the land which it was thus intended to benefit must be capable of being so benefited. In cases where the plaintiff sues as express assignee there is not the technical requirement of "touching and concerning", since that is a condition relevant only to covenants which *run with land* in the strict sense. But the requirement now under consideration seems to be of substantially the same character, and means that the ascertainable land must be itself affected by observance or non-observance of the covenants.

16. *Plaintiff's land.*

4. The plaintiff must, of course, have some at least of the ascertainable land, else the covenant, so far as he is concerned,

would be in gross, and he would be in no better position than is an original covenantee who has no land. He would be in fact in a worse one, as being unable to enforce even against the original covenantor. It is true that Vaughan Williams, L.J., in *Formby* v. *Barker*, [1903] 2 Ch. 539, at p. 552, suggests that a personal representative (who is in the same position as any express assignee) could so enforce. "R. H. Formby could have sued the purchasers for breaches in his lifetime, and I think that his executrix could have sued the purchasers for breaches after his death, but I do not think that the executrix can sue the assignee of the purchasers." The rest of the Court disagreed with this view, upon the ground that there would be no limit to the period during which the owner of the restricted land would be under the threat of an action by such a personal representative : *per* Stirling, L.J., at p. 555.

17. *Plaintiff assignee of covenant.*

5. The plaintiff must have become entitled to the benefit of the covenant as express assignee (*g*) of the covenant from the original covenantee, or, where there have been mesne assurances of the land, as the last of a series of express assignees.

18. *Covenant never separated from the land.*

In each case the assignment of the covenant must be substantially contemporaneous with the assurance of the land, or at any rate connected with it as part of the same transaction (*h*); for the purpose of the doctrine is to allow a covenantee to assign the benefit of the covenant so as to assist him in disposing of the land to the best advantage. Consequently, if the land has at any time been separated from the covenant, the owner of the land cannot subsequently get the covenant in : "to hold (otherwise) . . . would be to treat the covenant as having been obtained, not only for the purpose of enabling the covenantee to dispose of his land to the best advantage, but also for the purpose of enabling him to dispose of the benefit of the covenant to the best advantage" : *per* Romer, L.J., in *Miles* v. *Easter*, [1933] Ch. 611, at p. 632.

Thus in *Chambers* v. *Randall*, [1923] 1 Ch. 149, the covenantee disposed of all his land in his lifetime without assigning the benefit

(*g*) Assignment by operation of law is sufficient, *e.g.*, under the transitional provisions of Law of Property Act, 1925: *Achilli* v. *Tovell*, [1927] 2 Ch. 243; and cf. § 29, *infra*.

(*h*) Where the assignment is not by operation of law, it will as a rule be found in the deed conveying the protected land. Presumably, however, an assignment in writing of even date would be sufficient, but not one by parol : Law of Property Act, 1925, s. 53 (1) (a).

of the covenant. From that moment the covenant ceased to be enforceable, otherwise than against the original covenantor, by him and his executors because they had no land, and by the assignee of the land, because he had no assignment and could not thereafter obtain an effective one : cf. *Re Rutherford's Conveyance*, [1938] Ch. 396. On the other hand in *Northbourne* v. *Johnston & Son*, [1922] 2 Ch. 309, the land and covenant were separated, but in circumstances where all that was outstanding was the bare legal estate in the covenant. The assignors were therefore bound to assign to the assignee, who had already an equitable interest in the benefit of the covenant, and consequently the covenant, once assigned, was enforceable. It is suggested, therefore, that a purchaser who contracted for an express assignment in his contract to purchase the land, would be able on this principle to have it legally assigned by a later document.

C. *Building Schemes and other Schemes of Development.*

19. *Schemes.*

The third way in which a plaintiff may enforce a covenant, not being the original covenantee, is where both he and the defendant ultimately derive title from a common source, and where the conditions are present to constitute a scheme of development. Such a scheme arises where a defined area of land is divided into sections by the common owner with the intention that covenants shall be imposed whereby the whole area shall in future be used in accordance with a particular plan, and on the understanding that each person claiming under the common vendor is to have the benefit of the covenants entered into by every other such person, whether such person took before or after him from the common vendor. The most typical example of this class of case is the so-called "building scheme", where the common owner has an estate of vacant land which he has laid out, and proposes to sell off in lots for building purposes. But the principle does not apply only to such cases : see *Torbay Hotel, Ltd.* v. *Jenkins*, [1927] 2 Ch. 225, *per* Clauson, J., at p. 241. Nor is it confined to freeholds. For example, in *Hudson* v. *Cripps*, [1896] 1 Ch. 265, a scheme had been created in respect of a block of flats already built. So also in *Spicer* v. *Martin*, 14 App. Cas. 12, the scheme created by Spicer was created in respect of leasehold houses already built. And it would not be impracticable to create a scheme in respect of agricultural land, by imposing a mutual covenant not to build at all. Further, the common owner may either sell or lease the land subject to the scheme. If he

sells, the purchasers can enforce *inter se*. If he leases, the lessees can each enforce during their respective terms (*i*).

20. *Liability of common vendor.*

In the absence of a power to waive or vary the stipulations (as to which see *infra*, § 26) the common owner is himself bound, as against his purchasers or lessees, in respect of any of the property which may still be vested in him. *Mackenzie* v. *Childers*, 43 Ch. D. 265; *Hudson* v. *Cripps*, [1896] 1 Ch. 265; *Gedge* v. *Bartlett*, 17 T. L. R. 43; *Jaeger* v. *Mansions Consolidated, Ltd.*, 87 L. T. 690: cf. *Sidney* v. *Clarkson*, 35 Beav. 118. And accordingly he must impose covenants similar to those already imposed upon any of the land with which he later parts: see *Rowell* v. *Satchell*, [1903] 2 Ch. 213.

21. *Development of doctrine.*

The notion of a scheme is one after which the Courts seem gradually to have been feeling in the half-century preceding *Elliston* v. *Reacher*, [1908] 2 Ch. 374, 665. For example, there seem to have been primitive schemes in *Whatman* v. *Gibson*, 9 Sim. 196; *Coles* v. *Sims*, 5 D. M. & G. 1, and possibly in *Western* v. *Macdermott*, L. R. 1 Eq. 499; L. R. 2 Ch. 72. And in *Sidney* v. *Clarkson*, 35 Beav. 118, the conception of a scheme was present to the minds of those concerned. The expression "building scheme" does not appear to have occurred in the Reports prior to an interlocutory observation of Hall, V.-C., in *Renals* v. *Cowlishaw* (1878), 9 Ch. D. 125, at p. 128. A building scheme was actually before the Court in *Gaskin* v. *Balls* (1879), 13 Ch. D. 324, and by 1885-6 the doctrine reached a fair degree of precision in *Nottingham Patent Brick and Tile Co.* v. *Butler*, 15 Q. B. D. 261; affirmed 16 Q. B. D. 778. It was extended in *Collins* v. *Castle* (1887), 36 Ch. D. 243, and examined in the House of Lords two years later in the leading case of *Spicer* v. *Martin*, 14 App. Cas. 12. In the same year the doctrine was treated as well-established in *Mackenzie* v. *Childers*, 43 Ch. D. 265.

22. *Elliston* v. *Reacher.*

Finally the law was stated with precision by Parker, J., in *Elliston* v. *Reacher*, [1908] 2 Ch. 374, in a passage which has since been accepted as a complete statement of the position. His

(*i*) "Building schemes" are a mere species of a genus: see *per* Greene, M.R., in *White* v. *Bijou Mansions, Ltd.*, [1938] Ch. 351, at pp. 357 ff. The distinction between building schemes and other schemes seems to have little practical importance.

Lordship said, at p. 384: "In my judgment, in order to bring the principles of *Renals* v. *Cowlishaw* and *Spicer* v. *Martin* into operation, it must be proved (1) that both the plaintiffs and the defendants derive title under a common vendor; (2) that previously to selling the lands to which the plaintiffs and defendants are respectively entitled the vendor laid out his estate, or a defined portion thereof (including the lands purchased by the plaintiffs and defendants respectively), for sale in lots, subject to restrictions intended to be imposed on all lots, and which, though varying in details as to particular lots, are consistent only with some general scheme of development; (3) that those restrictions were intended by the common vendor to be, and were, for the benefit of all the lots intended to be sold, whether or not they were also intended to be, or were, for the benefit of other land retained by the vendor; and (4) that both the plaintiffs and the defendants, or their predecessors in title, purchased their lots from the common vendor upon the footing that the restrictions, subject to which the purchases were made, were to enure for the benefit of the other lots included in the general scheme, whether or not they were also to enure for the benefit of other lands retained by the vendors. If these four points be established, the plaintiffs would in equity be entitled to enforce the restrictive covenants entered into by the defendants or their predecessors with the common vendor, irrespective of the dates of the respective purchases" . . . "Further, if the first three points be established, the fourth may readily be inferred, provided the purchasers have notice of the facts involved in the first three points: but if the purchaser purchases in ignorance of any material part of those facts, it would be difficult, if not impossible, to establish the fourth point" (*k*).

Such is the statement of the law which has ever since been regarded as final. The position of the persons holding under a scheme has been aptly described as follows: "They all had a common interest in maintaining the restriction. This community of interest necessarily . . . requires and imports reciprocity of obligation": *per* Lord Macnaghten in *Spicer* v. *Martin*, 14 App. Cas. 12, at p. 25. Parker, J., added that this reciprocity "is in fact contemplated by each at the time of his own purchase": *Elliston* v. *Reacher*, [1908] 2 Ch. 374, 385. It would be unjust if persons who take plots which are subject to a scheme of development, and know that that is what they are doing, were to be permitted

(*k*) A building scheme must be specially pleaded: *Grant* v. *Derwent*, [1928] Ch. 902, the necessary facts may therefore be stated quite shortly in the statement of claim.

to escape their obligations. Once the common vendor has sold all his land in the neighbourhood he would be in no position to enforce, nor would he, perhaps, if he retained only a holding of insignificant size, as suggested earlier : see *supra*, § 10. But for this doctrine covenants on a planned area annexed by conveyances to the whole and each and every part of the land retained at the date of each by the vendor, would be enforceable and enforceable only by the persons whose predecessor took from the common vendor *after* the date of the covenants. Conversely, the persons taking subject to the covenants could not insist upon the insertion of similar covenants upon later sales by the common vendor. There would thus be no mutuality.

Restrictive covenants can, however, only be enforced otherwise than between original covenantor and covenantee by virtue of the possession of land capable of being protected : *L. C. C.* v. *Allen*, [1914] 3 K. B. 642. It is apprehended that even in the case of a scheme it could be said that some of the plots were so remote from others as to be incapable of being thus benefited. The area would, however, have to be extremely large to justify such an argument, because the imposition of a "local law" itself raises a presumption that the whole area is affected. Moreover, the damage caused by the infringement of any stipulation in a scheme is not only the immediate annoyance or other detriment to the neighbourhood, but also the impairment of the "local law" by the fact of breach.

23. *Form of creation.*

No annexation is necessary, nor is any assignment. In regard to form, all that is required is that each purchaser shall covenant with the common vendor. On the other hand, there will not be a scheme, even if all the other requirements laid down in *Elliston* v. *Reacher* are fulfilled, unless the intention to create one is present. The existence of such intention may be negatived, the most obvious way being by express declaration. It may also be negatived by provisions in the conveyance inconsistent with it. For example, in *White* v. *Bijou Mansions, Ltd.*, [1938] Ch. 351, Greene, M.R., relied for this purpose upon the fact that the common vendors had covenanted to impose the covenants on subsequent purchasers and to enforce them by action when called upon by the purchasers to do so (at p. 363).

24. *Sub-schemes.*

Within an area subject to a scheme, there may be a sub-scheme : *Knight* v. *Simmonds*, [1896] 1 Ch. 653; 2 Ch. 294. Where one

or more plots are subjected to a sub-scheme, an owner outside the sub-scheme can enforce the stipulations of the scheme against an owner inside the sub-scheme, and *vice versa*, while as between owners both within the sub-scheme the enforceable stipulations are those of the sub-scheme only: see also *Grant* v. *Derwent*, [1928] Ch. 902. If, however, a plot is sub-divided without the original restrictions or any new ones being imposed on the purchaser of one part, for the benefit of another, there is nothing which the owners of the subdivisions can enforce *inter se*: *King* v. *Dickson*, 40 Ch. D. 597.

25. *Cases where no scheme.*

In certain cases it has been held that there is no scheme where one or more of the four points has not been established. For example, in *Osborne* v. *Bradley*, [1903] 2 Ch. 446, there was no sufficiently defined area. Such was also the case in *Reid* v. *Bickerstaff*, [1909] 2 Ch. 305, and in *Torbay Hotel* v. *Jenkins*, [1927] 2 Ch. 225. In *Willé* v. *St. John*, [1910] 1 Ch. 84, 325, on the other hand, the action failed because the covenants had been imposed, not by the common vendor of the plaintiff and defendant, but by the vendor to the common vendor, for the benefit of his retained land. And, in *Tucker* v. *Vowles*, [1893] 1 Ch. 195, there was held to be no scheme in spite of the facts that the land had been plotted out, an estate map made, and a common form of agreement printed, because there was no evidence to lead the Court to hold that the object of the common vendor was to do other than to benefit himself, nor that he intended the scheme to be binding on himself and those claiming under him for the benefit of purchasers. Again, in *Browne* v. *Flower*, [1911] 1 Ch. 219 (a leasehold case), it was held that there was no scheme, although the covenants in all the leases of a certain block of flats were similar, because those covenants were inserted owing to certain covenants in the head-lease, and not in order to benefit the tenants of the flats.

26. *Powers to waive or vary.*

In many cases the common vendor retains a power to waive or vary the stipulations. That is to say, he reserves power to license deviations by himself or any other persons from the stipulations already entered into and/or a power to sell future lots under varied conditions or none at all. By itself such a power does not amount to a declaration against a scheme; in fact it is evidence of an intention that some person other than the vendor and his assigns is to be able to enforce; else no such power would be necessary.

In *Whitehouse* v. *Hugh*, [1906] 1 Ch. 253; 2 Ch. 286, it was held that such a power is valid, though it was not necessary to decide whether it would enable the common vendor to make a "radical" alteration in the scheme: cf. *Mayner* v. *Payne*, [1914] 2 Ch. 555. In *Pearce* v. *Maryon-Wilson*, [1935] Ch. 188 (a case of a leasehold scheme), it was, however, held that where the stipulations of the scheme were not to be infringed "without the consent in writing of the lessor having been first obtained", those words must be read in their natural sense as conferring on the lessor the widest possible power of giving or withholding his consent, and he might therefore authorise any user he chose without regard to anything but his own wishes. In short, a person who takes under a scheme, which in terms puts him at the mercy of the common vendor in regard to the user of other plots, cannot be heard to allege any implied condition in the scheme protecting him against the exercise of the power to license or vary; see *per* Romilly, M.R., in *Sidney* v. *Clarkson*, 35 Beav. 118, especially at p. 123. Such powers may sometimes be reserved to A or his assigns as owners of a named estate. Similar considerations then arise as arise in regard to the enforcement of restrictive covenants annexed to a named estate: it is a question of construction what the named estate is, and of fact whether a person seeking to exercise the power retains sufficient of it to entitle him to say that he is owner of it: *Everett* v. *Remington*, [1892] 3 Ch. 148; cf. *Re Ballard's Conveyance*, [1937] Ch. 473 (cf. also cases where power to form an opinion as to annoyance, etc., is given to a named or described person: see V, §§ 22 ff.).

27. *Estate in protected land of original covenantee.*

Such are the three modes in which a plaintiff other than the original covenantee may become entitled to enforce a covenant. There remain to be considered: (i) What estate in the protected land the original covenantee must have in order to enable him to create a covenant whose benefit may be thus transmitted to persons claiming under him; (ii) granted that a transmissible covenant has been created, what estate in the protected land the plaintiff must have in order to support the action.

If the original covenantee has only a limited interest, the covenant will not enure for the benefit of the fee simple. Thus, in *Ricketts* v. *Enfield Churchwardens*, [1909] 2 Ch. 544, a lessor covenanted with the lessee not to do certain acts on his adjacent land not comprised in the demise. It could not have been argued that anyone could have enforced the covenant after the determina-

tion of the term. But the covenant was validly created for the period of the term. Normally, of course, a covenant is taken by a covenantee who is entitled to the whole legal and equitable fee simple. But it may also be taken so as to benefit the whole fee simple by some classes of person having a lesser interest. Thus in *Zetland* v. *Driver*, [1937] Ch. 651; (1938), 54 T. L. R. 594, the original covenantee was a tenant for life; *i.e.*, a person having the legal fee simple but in equity a mere life interest (*l*). In *Rogers* v. *Hosegood*, [1900] 2 Ch. 388, it was held that a mortgagor was a competent original covenantee, although he had a mere equity of redemption. *A fortiori*, therefore, he could now take the benefit of covenants, since he must have the legal estate.

In *Manners* v. *Johnson*, 1 Ch. D. 617, covenants were validly annexed to the fee by a mortgage in possession.

In *Ives* v. *Brown*, [1919] 2 Ch. 315, which was not a case of annexation, but of express assignment, the original covenantees were persons in whom the legal estate was vested upon trusts. Conversely, in *Re Rutherford's Conveyance*, [1938] Ch. 396, it was assumed that a person having only a contract for purchase of the land alleged to be the protected land could validly take the benefit of covenants for the protection of trust land. On the other hand, in *Forster* v. *Elvet Colliery Co.*, [1908] 1 K. B. 629, it was said that a covenant with the occupiers of certain land for the time being would not run with the land; that is to say, occupiers at the date of the covenant are not competent original covenantees beyond their own occupancy, and future occupiers, who are unascertained, are not capable of being covenantees at all, even under Real Property Act, 1845, s. 5, now replaced by the Law of Property Act, 1925, s. 56: see I, § 8.

Under Town and Country Planning Act, 1932, s. 34, an authority under that Act may enter into agreements restricting the "planning, development, or use" of land, and may enforce them "as if the authority were possessed of, or interested in, adjacent land and as if the agreement had been entered into" for the benefit of that adjacent land. Similar powers are conferred on local authorities by Housing Act, 1936, s. 148.

28. *Estate in protected land of plaintiff.*

Once the covenant is validly created in favour of the fee simple,

(*l*) Settled Land Act, 1925, s. 49 (1) (b), provides for the taking of restrictive covenants on a sale of settled land. Trustees for sale and personal representatives have also, of course, the powers of a tenant for life: Law of Property Act, 1925, s. 28 (1), and Administration of Estates Act, 1925, s. 39 (1).

a class of persons much wider than the class of competent original covenantees become competent plaintiffs in an action upon it, subject, of course, to the rules as to its transmission already explained.

Thus by virtue of Law of Property Act, 1925, s. 78, an annexed covenant can be enforced by owners or occupiers for the time being. Where under the general law assignment is necessary, this section does not render it unnecessary. In *Zetland* v. *Driver*, [1937] Ch. 651; (1938), 54 T. L. R. 594, the successful plaintiffs were the person in whom the legal estate in the settled land had become vested as tenant for life in succession to the original covenantee, and the assignee of his equitable life interest. In *Ives* v. *Brown*, [1919] 2 Ch. 315, the successful plaintiffs were the personal representatives of the survivor of original joint covenantees. A person whose interest in the protected land is in reversion can succeed in the action: see VI, § 6. So also a purchaser of the protected land, though he has not completed : *Jaeger* v. *Mansions Consolidated, Ltd.*, 87 L. T. 690.

There seems to be some doubt as to the position where the plaintiff is a lessee (whether or not he is in actual occupation) of the original covenantee or of his assignee. In *Taite* v. *Gosling*, 11 Ch. D. 273, Fry, J., decided that he could sue. On the other hand in *Westhoughton Urban Council* v. *Wigan Coal & Iron Co.*, [1919] 1 Ch. 159, it appears to have been decided that a lessee could not sue in such circumstances, at least where, as in that case, his lease contained no express assignment of the benefit of the covenant. But Swinfen Eady, M.R., seems to have been under some misapprehension as to the circumstances of *Taite* v. *Gosling*, since on pp. 170-1 he first cites it as authority for what it decides, and in the next sentence without further explanation propounds a statement quite inconsistent with it. Clearly annexed covenants, which inhere in the land and pass as appurtenances of it, do enure for the benefit of the lessee of the land in which they inhere; they are, if the covenants are entered into after 1881, within the express words of Law of Property Act, 1925, s. 78, or its predecessor Conveyancing Act, 1881, s. 58. On the other hand, in cases where assignment of the benefit of the covenant is necessary if the plaintiff is the fee simple owner, it will *a fortiori* be necessary if he is a lessee or other person having a limited interest : see *S. E. R.* v. *Associated Portland Cement Manufacturers (1900), Ltd.*, [1910] 1 Ch. 12. Accordingly the decision itself in *Westhoughton Urban Council* v. *Wigan Coal & Iron Co.*, [1919] 1 Ch. 159, is not inconsistent with the rules suggested, because there was no annexation in that case, and accordingly

assignment was properly held to be necessary. Conveyancing Act, 1881, s. 58, was not there cited.

29. *Personal representatives.*

Where the covenant is annexed, it is clear that upon the death of the original covenantee or other person in whom the protected land is vested, the benefit of the covenant will now pass to the personal representative and not to the heir or devisee, notwithstanding that the covenant may have been made with the covenantee "and his heirs": Law of Property Act, 1925, s. 80. See *Forster* v. *Elvet Colliery Co.*, [1908] 1 K. B. 629, aff. *sub nom. Dyson* v. *Forster*, [1909] A. C. 98. In such a case the benefit will also automatically pass to the person to whom the legal estate in the protected land is assigned by the assent or vesting assent as the case may be.

A rather difficult position arises in cases where express assignment is necessary. Since the Land Transfer Act, 1897 (*m*), the personal representative takes, as such, the whole real and personal estate of the deceased. He takes it under the Probate or Letters of Administration; the grant carries, of course, the benefit of the covenants, just as if they had been expressly assigned *inter vivos*.

He can in the first place sue in respect of any breaches occurring before the death, where the deceased could himself have sued, since the right of action is part of the deceased's estate. Secondly, if the covenants are annexed to the land he takes the land and the covenants just as a purchaser does. But if the case is one where there is ascertainable land and express assignment is necessary, the grant operates as such an assignment: *Ives* v. *Brown*, [1919] 2 Ch. 314. On the other hand, as in *Chambers* v. *Randall*, [1923] 1 Ch. 149, where the covenantee has parted with all his land in his lifetime (or, *a fortiori*, where he never had any retained land), and so would have been unable to sue an assignee if he had still been alive, the personal representatives are in no better position. Nor can they even sue the original covenantor, in such circumstances, as the deceased could have done: *Formby* v. *Barker*, [1903] 2 Ch. 539, discussed *supra*, § 16.

The same reasoning would presumably apply to the case of a trustee in bankruptcy, who is also an assign by operation of law, though there seem to be no reported cases relating to his position.

On the other hand, it is submitted that in a case where there

(*m*) By Administration of Estates Act, 1925, s. 1, the realty of a deceased person devolves on his personal representative. If the land is settled land, and remains so after the death, the legal estate is vested in the special executors under a grant limited to settled land: *ibid.*, s. 22.

is retained land, but where express assignment is necessary, the fact that a personal representative has assented to the vesting of the land in a document which omits to assign the covenant does not prevent the benefit of the covenant being assigned later, since the personal representative holds it on a bare trust for the assentee: *Northbourne* v. *Johnston & Son*, [1922] 2 Ch. 309.

(*To be continued.*)

CONDITIONS OF SALE OF LAND.

By E. O. Walford, LL.D., Solicitor.

(*Continued from Vol. 2, p. 341.*)

Insurances.

Law Society's Condition.

23.—As regards any policy of insurance maintained by the vendor in respect of any damage to or destruction of the property—

(1) Save where the vendor is under an obligation to a third party to insure, he shall not be bound—

(a) to keep on foot any such insurance.

(b) to give to a purchaser notice of any premium being or becoming due.

(2) The vendor shall, if required by a purchaser, consent to the name of the purchaser being endorsed on the policy or entered in the books of the insurers, as being interested in the policy, and in such case the purchaser shall on completion pay to the vendor the proportionate part of the current premium from the date of the contract up to the expiration of the current period of the insurance.

(3) If the contract is rescinded, the vendor may require such endorsement or entry to be cancelled.

The position regarding insurances effected by the vendor in respect of damage to or destruction of the property sold is regulated to some extent by section 47 of the Law of Property Act, which provides as follows :

47.—(1) *Where after the date of any contract for sale or exchange of property, money becomes payable under any policy of insurance maintained by the vendor in respect of any damage to or destruction of property included in the contract, the money shall, on completion of the contract, be held or receivable by the*

vendor on behalf of the purchaser and paid by the vendor to the purchaser on completion of the sale or exchange, or so soon thereafter as the same shall be received by the vendor.

(2) *This section applies only to contracts made after the commencement of this Act, and has effect subject to—*

(*a*) *any stipulation to the contrary contained in the contract,*

(*b*) *any requisite consents of the insurers,*

(*c*) *the payment by the purchaser of the proportionate part of the premium from the date of the contract.*

It is provided by sub-section 3 of the same section that the foregoing provisions are to apply also to a sale or exchange by an order of the Court.

Perhaps the most important points to note in connection with this section are as follows :—

(a) It applies to all kinds of insurance in respect of damage to or destruction of the property sold, and is not limited to damage by fire.

(b) It appears to apply only where damage has occurred to the property, and there appears to be no obligation upon the purchaser to take over any policy maintained by the vendor. (See below as to the effect of Condition 23 (2).)

(c) It applies only to policies in fact maintained by the vendor and does not compel the vendor to maintain any such policy. If the purchaser is relying upon the vendor to insure, *e.g.*, against fire, he should require the vendor to agree to maintain in force the particular policy or policies in question until actual completion. It is apprehended that if the vendor so agrees he will be liable in damages if through his default, or even through some technical point of which he was not aware, the policy is avoided prior to completion. The vendor, when entering into such agreement should, for the reasons mentioned below, be very careful to stipulate that the consent of the insurers shall be obtained.

(d) The purchaser takes the benefit of the moneys received by the vendor subject only to any necessary consents of insurers. The position of insurers is that they are responsible only to the actual insuring parties and their personal representatives, and are not concerned directly with purchasers or others having an equitable interest in the subject-matter of the insurance. Further, once the vendor has agreed to sell the property, the property is in all respects at the purchaser's risk : *Paine* v. *Meller* (1801), 6 Ves. 349.

(e) According to *Rayner* v. *Preston* (1881), 18 Ch. D. 1, where under an open contract the vendor recovers insurance moneys in respect of damage by fire occurring between the date of contract and the date fixed for completion, the vendor can retain such moneys as against a purchaser who has paid the whole of the purchase price. Section 47 has reversed this decision; and the equally well-known case of *Castellain* v. *Preston* (1883), 11 Q. B. D. 380 (following *Darrell* v. *Tibbitts* (1880), 5 Q. B. D. 560) which decided that the insurance company could recover the amount paid to the vendor (the contract being by way of indemnity only) is therefore no longer applicable, where section 47 has not been negatived by the contract, and the requisite consent of the insurers has been obtained. In other cases both these decisions still stand.

Although, as above stated, property is generally at the risk of the purchaser in all respects, there may be circumstances in which the Courts will not only refuse to decree specific performance, but will permit its rescission on the ground that supervening circumstances have caused the contract to be frustrated. The subsequent destruction by fire, tempest, earthquake or other abnormal activities of nature of buildings or structures standing upon the land at the date of the contract will not discharge the purchaser unless it can be shown that the contract was made upon the definite and absolute condition that such buildings or structures should remain in the same condition until the due date for completion of the purchase. It is thought that the cases in which the Court would hold that such a condition was implied must be extremely rare. It is doubted whether such a condition would be inferred from an undertaking by the vendor to continue the conduct of the business in the case of a sale of trade premises. In the case of destruction of the property by fire or other accident there would be no complete and final frustration of the contract. It is not clear that the vendor would be responsible to the purchaser in damages, for if the ordinary rule prevails, *viz.*, that the buildings on the land are at the risk of the purchaser, the vendor cannot be regarded as an insurer. It would therefore seem that his liability must be dependent upon the question whether the vendor warrants that the subject-matter of the sale shall continue in its present state until completion. No doubt instances may be furnished where the vendor must at his own risk produce the property complete and undamaged or suffer forfeiture of the contract. Thus, if the vendor is to erect upon the land a specified building by the date fixed for completion, time to be of the essence of the

contract, or if the vendor is to hand over to the purchaser (say) a theatre fully equipped and in a state fit for performances, he cannot escape such an obligation by a plea that the premises have been burnt down (cf. *Paradine* v. *Jane* (1646), Aleyn 26; *Bacon* v. *Simpson* (1837), 3 M. & W. 78; 7 L. J. Ex. 34; *Manchester Bonded Warehouse* v. *Carr* (1880), 5 C. P. D. 507). In such cases, however, it will be seen that there is no question of an *implied* condition. The purchaser is released because the vendor is unable to carry out his express undertaking. *Taylor* v. *Caldwell* (1863), 32 L. J. Q. B. 164, is sometimes quoted as bearing on this point; but this is not really so. Taylor had agreed to take a certain Music Hall for *four nights*; but as the Hall was burnt down, it became impossible to hold the proposed entertainment. Taylor had incurred considerable expense and sued the owner for damages; but the Court held that the contract was made on the basis of the continued existence of the property, and both parties were relieved from the contract. Such cases are entirely different from contracts for sale of freehold interests or substantial leasehold terms. Moreover, in *Taylor* v. *Caldwell* it was quite impossible for the owner to perform his part of the contract on any of the four nights on which the entertainments were to be given. Adopting the words employed by the House of Lords in a later case, the event which brought about the frustration occurred "in such circumstances as to show it to be inconsistent with the further prosecution of the adventure": *Hirji Mulji* v. *Cheong Yue S.S. Co.*, [1926] A. C. 497; and see *The Penelope*, [1928] P. 180; *Kursell* v. *Timber Operators, etc.*, [1927] 1 K. B. 1928, and distinguish *Cantiere, etc.* v. *Handelsvertretung, etc.*, [1925] 2 K. B. 172.

Where the contract is frustrated the loss is said to "lie where it falls". Thus, a deposit paid to a vendor cannot be recovered; but on the other hand where the deposit has been paid to a stakeholder it is recoverable by the purchaser: *Hastelow* v. *Jackson*, 8 B. & C. 221; *Burge* v. *Ashley*, [1900] 1 Q. B. 744.

In connection with the question of fire insurance mention must be made of the Fires Prevention (Metropolis) Act, 1774; but the path of a purchaser who seeks to obtain the benefit of that enactment is beset with thorns. Theoretically, by giving notice to the insurance company the purchaser may claim (under section 83), as a person interested in the property, to have the policy moneys applied in making good the damage without the consent of the insurers. The practical difficulties are, however, considerable.

(1) It is not altogether certain that the Act applies to houses outside London. Although *Re Quicke's Trusts*, [1908] 1 Ch. 887, and *Sinnott* v. *Bowden*, [1912] 2 Ch. 414, are authorities to that

effect, there are *dicta* of Lord Watson in the House of Lords to the contrary in the earlier case of *Westminster Fire Office* v. *Glasgow, etc., Society* (1888), 13 App. Cas. 699.

(2) The vendor being no longer at risk he may be unable to recover the policy moneys or to require the application thereof in reinstatement of the property, or if he recovers the policy moneys the insurers may be able to recover the policy moneys (*Castellain* v. *Preston, supra*), and it does not appear that the purchaser has an independent right under the statute to compel the insurance company to pay the policy moneys for his benefit under an open contract.

(3) The claimant must make his demand before the insurers have paid the policy moneys to the insured: *Simpson* v. *Scottish, etc., Insurance Co.* (1863), 1 H. & M. 618.

Leaseholds.

The question of insurance of leasehold property between contract and completion stands upon a different footing. It is the duty of the vendor to maintain the insurance against damage by fire up to the due date for completion if the lease contains a covenant by the lessee to insure. Moreover, it will be remembered that if the vendor is selling as beneficial owner, and will therefore assign as such, the covenants implied by virtue of section 76 (incorporating the Second Schedule, Part II) of the L. P. Act, 1925, will include a covenant by the vendor that he has complied with all his obligations under the lease up to the date of the assignment.

In *Dowson* v. *Solomon* (1859), 1 Drew. & Sm. 1, leasehold premises were sold on the basis that completion should take place on July 20; but completion was delayed by certain disputes. It transpired that the insurance which was due for renewal on June 24 was renewed by the vendor up to July 24, whereafter the lease was liable to forfeiture owing to the breach of the covenant to keep the property insured. It remained so liable until September, whereupon the purchaser purported to rescind the contract. Later, the vendors obtained a waiver of the right of forfeiture (having renewed the insurance), and sought to obtain specific performance. The contract provided that the vendors were to pay all "outgoings" up to the date fixed for completion, and it was held that this provision applied to the insurance premium. Upon the dry question of liability for payment of the amount (or proportion) of the premium thereafter the purchaser was held to be liable to meet the expense of renewing the insurance. The Court also held that the purchaser, knowing that, under the terms of the lease, the lease was liable to forfeiture if the insurance against fire were not

retained, the vendors were under no obligation to renew the insurance beyond the date of its expiry, which was subsequent to the date of the contract but prior to the date fixed for completion. As the vendors had, however, renewed the insurance in this peculiar manner without advising the purchaser, and thus warning him of the danger of the situation, specific performance was not decreed. In *Dowson* v. *Solomon*, *supra*, the vendor had specifically agreed to pay all outgoings up to the date fixed for completion, but the vendor is also liable in the case of an open contract for sale of leasehold property (if held under a lease containing a covenant by the lessee to insure), to keep the policy in force at his own expense up to the date fixed for completion. (But see below as to Condition 23.)

Condition 23 (1).

It would seem clear that where the property is held under a lease containing a covenant by the lessee to insure, or is subject to a rentcharge created by a deed which contains a similar covenant with the grantee of the rentcharge, the vendor must keep on foot the appropriate insurance. Similarly, where the property is sold subject to a mortgage the vendor is most probably under an obligation to the lender to keep the property insured, and the condition would apply.

It is relevant to note here that in the Law Society's Condition No. 6 (3) which provides for apportionment of "outgoings", it is provided that the provisions of paragraph (3) shall not (unless otherwise agreed) apply to the premium under any policy of *fire* insurance, which appears to leave open the question whether premiums under other policies of insurance are outgoings within the meaning of that paragraph.

Condition 23 (2) *and* (3).

This condition requires the vendor to consent to the purchaser's name being endorsed on the policy *or* entered in the books of the insurers as being interested in the policy. As the purchaser is required to choose between one of these courses, and as the purchaser can take no benefit under the policy without the consent of the insurers, the purchaser's obvious course is to notify the insurance company of his interest in the policy and to state that it is presumed that the company will consent and will be good enough to confirm that the appropriate entry in their books has been made.

The mere entry of the purchaser's interest on the policy without the consent of the insurers would of course be of no effect. It

would in fact be very unusual for a purchaser to require the entry of the purchaser's name on the policy prior to completion. It is possible that this practice prevails in certain districts; but it seems inconvenient in view of the necessity for removing the note in the event of the contract being rescinded. Moreover, it may in practice create delay or difficulty in connection with a subsequent purchase, in spite of the fact that a contract for purchase entered into after 1925 would not affect a purchaser or mortgagee unless registered as an estate contract or, in the case of registered land, unless protected on the register at the Land Registry (Land Charges Act, 1925, ss. 13 and 23).

Paragraph (3) appears to be self-explanatory.

MATTERS RELATING TO THE CONVEYANCE.

Preparation of Conveyance.

Law Society's Condition.

24.—(1) The conveyance to a purchaser shall be prepared by him and at his own expense, and the draft thereof shall be delivered at the office of the solicitors of the vendor, at least ten days before the date fixed for completion for perusal and approval on behalf of the vendor and other necessary parties (if any).

(2) The engrossment of such conveyance for execution by the vendor and other necessary parties (if any) shall be left, at the said office, within four days after the draft has been returned approved on behalf of the vendor and such other parties (if any).

(3) Delivery of a draft or of an engrossment shall not prejudice any outstanding requisition.

(4) Provided as follows—

(a) where the sale is to be carried out in consideration of the reservation of a perpetual rentcharge, as the only consideration in money or money's worth, the vendor shall have the right, in the first instance, according to local usage, to submit a draft of the conveyance, and to require that the costs of the preparation thereof and of any counterpart thereof shall be borne by the purchaser, or (if no such usage obtains) to furnish a form of the conveyance from which the draft

can be prepared and to charge a reasonable fee, not exceeding two guineas, for such form:

(b) where the sale is to be carried out by means of a grant of a lease or an underlease, the vendor shall have the right to furnish a form of the lease or underlease from which the draft can be prepared and to charge a reasonable fee, not exceeding two guineas, for such form.

(5) This condition shall have effect without prejudice to the provisions of section 48 of the Law of Property Act, 1925, for securing the right of a purchaser to employ his own solicitor.

Condition 24 (1).

The requirement that the conveyance shall be prepared at the purchaser's expense is in accordance with the rule applicable in the case of an open contract: *Bolton* v. *Williams* (1793), 2 Ves. 138; *Poole* v. *Hill* (1840), 6 M. & W. 835. A condition providing that the assurance and every instrument required for completing the vendor's title or for any other purpose is to be prepared by and at the expense of the purchaser does not render the purchaser liable to pay the mortgagee's solicitors' costs in relation to the perusal and execution of the assurance to the purchaser, where the mortgagee joins in the conveyance to the purchaser: *Re Sander and Walford's Contract* (1900), 83 L. T. 316. Similarly, in the older case of *Paramore* v. *Greenslade* (1853), 1 Sm. & G. 541, where the purchaser was to have proper surrenders, conveyances or assignments at his own expense, it was held that a fine payable on the death of a trustee for sale must be borne by the vendor.

On the other hand, a provision that the assurance by the vendor and all other necessary parties and every act and thing required by the purchaser for perfecting or completing the vendor's title or otherwise shall be prepared, obtained, made and done at the expense of the purchaser was held to throw upon the purchaser the costs of the concurrence of the mortgagee: *Re Willett and Argenti* (1889), 60 L. T. 735. But if the mortgage is a legal mortgage it must now be remembered that section 42 (3) of the L. P. Act, 1925, provides that any stipulation that an outstanding legal estate is to be traced or got in at the purchaser's expense is void. By section 1 (2) (c) as read with section 1 (4) of the L. P. Act, 1925, a charge by way of legal mortgage is a legal estate equally with a mortgage term (which is an estate in land under section 1 (1) (b) of the Act and thus a legal estate by virtue of section 1 (4)). It is submitted that the *dicta* in the old case

of *Stronge* v. *Hawkes* (1856), 27 L. T. (o.s.) 150, in which the term "outstanding legal estate" was considered, do not involve any qualification of the statement that where the property is sold free from incumbrances the vendor must bear the cost of getting in any legal mortgage. It will be observed that section 42 of the L. P. Act, 1925, must be interpreted by reference to the definitions in sections 1 and 205.

Condition 24 (3).

The declaration that the delivery of a draft or of an engrossment shall not prejudice any outstanding requisition is useful. It will, however, be seen that the condition only protects requisitions actually delivered at the time when the draft or engrossment is delivered. Practitioners will therefore be well advised to follow the usual course of submitting drafts or engrossments "subject to requisitions to be delivered later" in all cases where it has not been possible to deliver the requisitions with or before submission of the draft or engrossment in question. When a very early date for completion is fixed it may often be necessary to submit the draft conveyance immediately the abstract is received, and this point then becomes of considerable importance.

As to whether delivery of a draft conveyance without reference to outstanding requisitions may be *prima facie* evidence of acceptance of title, see *Burroughs* v. *Oakley* (1819), 3 Swan. 159 (and *Conveyancer*, Vol. 1, p. 247), *Clive* v. *Beaumont* (1848), 1 De G. & S. 397.

If having delivered requisitions and made no objection to the replies the purchaser then submits the draft conveyance without prejudice to the requisitions, he will normally be deemed to have accepted the replies: *Sweet* v. *Meredith* (1862), 8 Jur. (N.S.) 637. The form of the draft conveyance may itself indicate that certain matters have to be dealt with, or that the purchaser will require certain representations, warranties or covenants in the conveyance. In that case any presumption as to waiver will be qualified accordingly: *Perriam* v. *Perriam* (1884), 49 L. T. 710. It seems safe to say that the mere submission of the draft assurance is not of itself sufficient evidence of acceptance of the title. It is but a circumstance which, taken with other circumstances, may lead to that conclusion. Moreover, any inference to be drawn from the submission of the draft assurance or other conduct suggesting waiver of requisitions is subject to the overriding rule that a purchaser can only be deemed to waive requisitions which could reasonably have been raised upon the abstract as submitted: *Turquand* v. *Rhodes*, 37 L. J. Ch. 830; and see *Wealdstone U. D. C.*

v. *Evershed* (1905), 69 J. P. 258. Although there would appear to be no authority upon the point, it is suggested that where the contract provides that requisitions shall be delivered within a specified period the position is as follows :—

(1) Unless the purchaser actually completes the purchase, or expressly waives his right to deliver requisitions, he is entitled to deliver requisitions or further requisitions at any time during the specified period, even though the draft conveyance is submitted before delivery of any requisitions.

(2) The submission of the draft conveyance is merely evidence that the purchaser desires to advance matters towards completion. The vendor having agreed upon a period for delivery of requisitions, must abide by the contract, and cannot complain that the purchaser has chosen to change the usual order, and to deliver the draft conveyance before the requisitions.

It must be emphasised that it is the usual practice in all cases, when submitting the draft conveyance prior to delivery of requisitions, to state it is submitted subject to requisitions to be delivered later, and in the absence of an express condition covering the point it would be imprudent to omit this precaution. Again, delivery of the draft conveyance after receipt of and non-objection to replies to requisitions may lead to the inference that the title is accepted even if the draft is submitted "subject to outstanding requisitions" (*vide supra*); but cf. *Hughes* v. *Jones*, 3 De G. F. & J. 307.

There would appear, in principle, to be no distinction between the effect of delivering the draft or the engrossment of the proposed assurance.

Condition 24 (4).

Paragraph (a) of this proviso deals with cases in which the land is being sold solely in consideration of the grant of a perpetual rentcharge. In such cases :

(1) Where there is a local custom to that effect the draft conveyance is to be submitted by the vendor and the costs of preparing the draft and of any counterpart of it is to be borne by the purchaser.

(2) In other cases the vendor is to supply a form of conveyance from which the draft can be prepared, and to charge the purchaser a reasonable fee not exceeding £2 2s.

As to the above provisions see the proviso to section 48 (1) of

the Law of Property Act, 1925, as set out in *The Conveyancer*, Vol 1, p. 312.

Paragraph (b) of the proviso enables the vendor, in cases where the sale is carried out by lease or sub-lease, to furnish the form of the proposed lease or sub-lease and to charge a sum not exceeding £2 2s. for such form. This accords with section 48 (1) of the Law of Property Act, 1925.

Condition 24 (5).

This paragraph reserves the right of the purchaser under section 48 to employ his own solicitor. See on this point *The Conveyancer*, Vol. 1, pp. 312 and 313.

PROPERTY SUBJECT TO RENTS.

Law Society's Condition.

25.—(1) Where any property is to be assigned, or subdemised, subject to an apportioned rent mentioned in the contract, a purchaser shall accept his assignment or underlease at or subject to the apportioned rent, and, in the case of an assignment, shall not require the consent of the reversioner to be obtained, or the rent to be otherwise legally apportioned.

(2) (i) Where the contract provides that a purchaser of any lot, being part of the property comprised in a lease, shall take an assignment of the lease of that and other lots, and grant underleases of the other lots to the purchasers of the other lots, the assignment and underleases shall be made accordingly, unless the vendor elects first to grant the underleases, and then assign the lease subject to the underleases so granted.

(ii) If all the lots comprised in a lease are not sold, the vendor shall carry out the sales of such of the lots as are sold by granting underleases thereof at the rents mentioned in the contract, and shall be entitled to retain the lease out of which the subterms are to be created.

(iii) Each underlease, and the counterpart thereof to be delivered to the underlessor granting the same, shall—

(a) be prepared, engrossed and stamped, by and at the expense of the purchaser who is to be the underlessee thereunder, but without prejudice to the right of the vendor, in the first instance, to

furnish a form from which the draft can be prepared;

(b) be executed by the underlessor and underlessee, respectively;

(c) contain all proper covenants by them having regard to the form of the principal lease out of which the subterms are to take effect.

(iv) The underlessor shall give to an underlessee an acknowledgment of his right to production and delivery of copies of the principal lease, and of any documents of title (not of record) relating thereto retained by the underlessor, and also, unless the vendor is in a fiduciary position, an undertaking for the safe custody thereof.

(v) If any difference or question arises as to—

(a) the form of any underlease,

(b) how any expenses are to be borne,

(c) the mode of giving effect to this condition or any other matter connected therewith,

such difference or question shall, unless the contract otherwise provides, be settled by arbitration by a sole arbitrator agreed by the parties, or, in default of agreement, nominated by the President or other principal officer for the time being of the local law society, or, where there is no local law society in the district wherein the land is situated, by the President for the time being of The Law Society, and the Arbitration Act, 1889, or any statutory modification or re-enactment thereof for the time being in force, shall apply accordingly.

Condition 25 (1).

In this paragraph it is assumed that the property sold is part only of the property comprised in a lease, and that the sale is to be carried out by way of assignment or sub-demise in accordance with Special Conditions specifying the rent to be apportioned to the property sold, or to particular lots in the case of a sale by auction. If the point is not covered by the Special Conditions this paragraph will debar the purchaser from requiring the consent of the reversioner to the apportionment of the rent or a legal apportionment. As to legal apportionment of the rent see Landlord and Tenant Act, 1927, s. 20 (*The Conveyancer*, Vol. 2, p. 51). Although the wording of this paragraph is not quite clear it seems to be deducible from the concluding words that the words "consent of the reversioner" must mean consent to the apportionment only

and not consent to the assignment or underlease. Any other construction would involve a contradiction of Condition 14 (7).

Even in the absence of this paragraph the purchaser would not be entitled to require the consent of the reversioner or a legal apportionment provided that the facts are clearly stated in the particulars or conditions of sale. The conditions of sale may state that the property is held with other premises at an entire rent under one lease, and that certain rents will be apportioned to the respective lots, one of the purchasers, *e.g.*, the purchaser of the largest lot, to take an assignment of the whole of the property subject to the underleases to be granted in respect of the other lots, such assignment to contain a covenant by the assignee to pay the full rent received by the lease and to perform and observe the lessee's covenants. In such a case it will be apparent to the purchaser that the rent is not to be legally apportioned: cf. *Camberwell, etc., Building Society* v. *Holloway* (1879), 13 Ch. D. 754. *West* v. *Wild* (1824), 3 L. J. (o.s.) Ch. 15, and *Browne* v. *Paull* (1856), 26 L. T. (o.s.) 232, are authorities for the proposition that even if the vendors are trustees they can only obtain specific performance on the basis that they give to the respective underlessees of parts of the property comprised in the lease a covenant to pay the head rent and to perform and observe the covenants contained in the original lease so far as the same relate to property not comprised in the particular underlease.

In *Paterson* v. *Long* (1843), 6 Beav. 590, A, having inspected the lease of lots 1 and 2, purchased lot 1 under conditions which stated that each lot was to be sold subject to a ground rent of £4 per annum in each case. He later resisted performance of the contract upon the ground that he would be liable to eviction if the purchaser of the other lot should fail to perform the covenants of the original lease. The purchaser having adequate notice of the facts when entering into the contract was ordered to complete the purchase.

Condition 25 (2) (i).

This sub-paragraph applies only if the Special Conditions provide that a purchaser of any lot forming part of the property comprised in a lease is to take an assignment of that part and of other lots, and then to grant underleases to the purchasers of those other lots. It then operates, very neatly but in a rather unusual manner, by way of option to the vendor to grant the underleases himself and then to assign the lease subject to the underleases so granted. It is not intended to meet cases in which the whole of the lots do not sell at the auction, for such

cases are covered by Condition 25 (2) (ii). It does, however, afford to the vendor the means of completing any sale or sales intended to be carried out by way of underlease without waiting to clear up any difficulty which may have arisen in connection with the lot which is to be dealt with by assignment. This point is one which may well have been overlooked in the Special Conditions, in which case this sub-paragraph will be extremely useful. A Special Condition will in any case be desirable and the following form may be suitable:—

"*All of the lots being held under one lease at an entire rent the sale shall be carried out in the manner following:—*

(*1*) *The vendor shall decide which purchaser shall take an assignment of the lease.*

(*2*) *Such assignment shall be made subject to the underleases of all the other lots (which underleases shall be granted by the vendor to the respective purchasers prior to such assignment) and shall contain a covenant by the assignee to pay the rent reserved by the said lease and to perform and observe the lessee's covenants and the conditions contained in the said lease by way of indemnity to the vendor, his estate and effects.*

(*3*) *Such underleases shall be for the full term granted by the said lease (less one day) at the respective apportioned rents mentioned in the particulars and shall contain covenants by the respective purchasers to pay such respective apportioned rents and to perform and observe the covenants and conditions contained in the said lease so far as the same relate to their respective lots.*

(*4*) *The vendor will enter into the usual vendor's covenants in the assignment and underleases for title and further assurance (but not so as to render himself liable in respect of any non-payment of rent or breach of the covenants or conditions contained in the said lease on the part of any of the respective purchasers).*

(*5*) *The respective underleases shall contain the usual acknowledgment by the vendor for production and delivery of copies [and undertaking for safe custody] of the said lease [and other documents of title in the vendor's possession].*"

It is to be remarked that if the vendors are trustees or mortgagees they will only covenant in the assignment and underleases in the usual qualified manner (by assigning or demising in that capacity), and the conditions should contain a provision to this effect and should state that the underleases will contain the usual

qualified covenant for quiet enjoyment, and that only an acknowledgment but no undertaking for safe custody will be given in respect of the original lease.

Condition 25 (2) (ii).

This condition states, in effect, that if all lots are not sold the vendor will grant underleases of the lots sold and will retain the original lease. It seems clear that an underlessee could not call for the delivery of the original lease under an open contract. The condition does not refer to assignments of the original lease or other documents retained by the vendor; but the same remark applies to such documents. Moreover, as to cases governed by these conditions the provisions of Condition 25 (2) (iv) necessarily presuppose that the original lease and other documents of title will be retained by the vendor as against underlessees.

Condition 25 (2) (iii).

(a) This condition does not throw upon the underlessee the scale costs of the underlessor's solicitor in respect of the underlease. On the contrary it provides that the underlease and the counterpart are to be prepared and engrossed by the underlessee, although the vendor may submit a form from which the draft can be prepared. See further on this point section 48 of the L. P. A., 1925, and the notes thereon, set out above (*The Conveyancer*, Vol. 1, pp. 312 and 313). The short point to be noted is that this section renders void any condition which provides that an assignment or underlease is to be carried out on a sale by demise or sub-demise by *the vendor's solicitor* at the purchaser's expense.

(b) This paragraph appears to require no comment.

(c) As to the covenants and provisions which are appropriate see observations above under Condition 25 (2) (i), where the appropriate Special Condition is also set out.

Condition 25 (2) (iv).

See form of Special Condition and observations following Condition 25 (2) (i) *supra*. This paragraph requires the vendor to give to the underlessee an undertaking for the safe custody of the original lease unless the vendor is "in a fiduciary position". It is not clear that this expression is applicable to a mortgagee. It is true that a mortgagee exercising his power of sale cannot fraudulently, wilfully, or recklessly sacrifice the mortgaged property: *Kennedy* v. *Trafford*, [1896] 1 Ch. 762, affirmed [1897]

A. C. 180; but as was said in the same case: "A mortgagee is not a trustee of a power of sale for the mortgagor at all; his right is to look after himself first" (*per* Lindley, L.J.). He is merely a trustee of the proceeds after he has *completed* the sale: *Kirkwood* v. *Thompson*, 2 H. & M. 392, and cf. *Nutt* v. *Easton*, [1899] 1 Ch. 873, on appeal [1900] 1 Ch. 29. It is therefore suggested that whilst the general condition remains in this form a Special Condition is desirable (where a mortgagee is selling) to the effect that for the purposes of this condition the vendor shall be deemed to be in a fiduciary position. Compare the reference in Condition 30 (which in this respect appears to be better drawn) to documents retained by "a mortgagee trustee or personal representative".

Whilst a properly drawn underlease should and does contain an acknowledgment of the right of the underlessee to production and delivery of copies of the lease of the reversion it is not a general practice to give to the underlessee an acknowledgment in respect of the subsequent deeds establishing the underlessor's title to that lease. In principle the Law Society's Condition, which entitles the purchaser to require that the acknowledgment should extend to such documents is, however, clearly correct.

Condition 25 (2) (v).

As to the form of the underlease to be granted, it is true that the provisions to be inserted are limited to a certain extent by the terms of the original lease; but experience shows that considerable differences of opinion can exist as to the exact covenants and provisions which should be inserted in the underlease in such cases. It is therefore suggested that it is desirable that the conditions should state what covenants, other than the covenants in the original lease, are to be contained in the underlease. As to the manner in which expenses are to be borne see Condition 25 (2) (iii) (a) and the observations thereon, *supra*. The Law Society's Conditions appear to cover sufficiently all ordinary cases.

The Law Society have expressed the opinion that any fee payable for registration of the underlease with the superior lessor in such cases should be borne by the underlessee in the absence of special agreement, *opinion of Council, May* 26, 1921.

Title.

No reference is made in this Condition to the title to be deduced by the underlessor on the grant of the various underleases, and

the Law Society's Condition 14 does not appear to be intended to apply to such cases. It would therefore appear that each underlessee would be entitled to require the underlessor (vendor) to deduce title to the lease out of which the underlease is to be carved. Reference should, however, be made in this connection to the observations above in relation to Condition 14 (*The Conveyancer*, Vol. 2, pp. 141—143).

(*To be continued.*)

NOTES OF RECENT CASES.

1. *CONVEYANCING AND REAL PROPERTY CASES.*

Auction sale — memorandum by agents — three lots in one contract.—In *Smith* v. *MacGowan*, [1938] 3 All E. R. 447, the short point was whether a memorandum for the sale of three lots which was expressed not as three separate contracts but as one contract for the sale of the whole was valid. The defendant had instructed his agent to bid for three lots and each lot was knocked down to him. The following day a memorandum was drawn up between the vendor and the purchaser's agent whereby the purchaser should purchase lots 1, 2 and 3 at the price there named. Luxmoore, J., held that this was not a good memorandum. The agent was not authorised to enter into an agreement to purchase the three lots together, but only to bid, that is, contract for each separate lot. The point is, perhaps, of the most likely occurrence when the memorandum is signed by the auctioneer under his implied authority to sign for purchaser as well as vendor: See *Chaney* v. *Maclow*, [1929] 1 Ch. 461.

Settled land—principal mansion-house.—Re Faversham S. E., [1938] 2 All E. R. 210, goes one step further in defining the rules for ascertaining what is the principal mansion-house for the purposes of the Settled Land Act. The matter is of importance because where the settlement came into operation prior to 1926 no disposition, including a grant of an easement (*Pease* v. *Courtney*, [1904] 2 Ch. 503) can be made without the consent of the trustees or the Court, unless otherwise provided by the settlement. Where the settlement came into operation after 1925 such consent must be required by the settlement, and presumably a purchaser would only be concerned where this consent is mentioned in the vesting deed : section 110 of the Act of 1925. Another point affected by this question is that raised in the case noted, namely, the repayment of money expended on the mansion-house. Where there are two estates settled by the same settlement there may be two principal mansion-houses : see *Re Wythes S. E.*, [1908] 1 Ch. 593,

and an estate can have no principal mansion-house: *ibid.* In *Gilbey* v. *Rush*, [1906] 1 Ch. 11, it was laid down that what is the principal mansion-house is a question of fact and that the consent need not be in writing but may be inferred. In *Re Faversham S. E.* (*supra*), the problem was more involved, because what had been the principal mansion-house was let on lease by the trustees during the minority of the tenant for life. The tenant for life had taken up another residence on the estate, and found that he could not afford to live in the former mansion-house. He proposed to grant a further lease for thirty years of the former mansion-house. On the other house the tenant for life expended a considerable sum in renovation which he sought to be recouped out of capital moneys. Before deciding this the learned Judge found it necessary to decide whether the second house could be treated as the mansion-house of the estate, since sums spent on rebuilding the mansion-house fall within Part I, para. xxv of Schedule III of the Act, and are not liable to be repaid by instalments. Farwell, J., held that the former principal mansion-house had, at least for the time being, ceased to be the principal mansion-house, and the other house had become the principal mansion-house. The learned Judge felt the difficulty that after the expiration of the thirty years' term then to be granted the former principal mansion-house might be resumed as such if the then limited owner had the means to do so. In all the circumstances he decided that at least temporarily the other house had become a principal mansion-house. The emphasis, of course, is laid upon the fact that the question whether a house is a principal mansion-house is one of fact, but the decision depends upon two further points, first that a change may be made from one mansion-house to another without a sale of the former mansion-house, and, *semble*, that a house may be temporarily a mansion-house. Presumably it must be a question of fact what certain temporary period is long enough to constitute the house a mansion-house.

Settled land—"binding" trust for sale—compound settlement—tenant for life—trustees of compound settlement.—Re Sharpe's Release, [1938] 3 All E. R. 449, offers further guidance on the problem of binding trust for sale. The facts were very complicated, but it would seem that the position was that on December 31, 1925, the fee simple in the land was vested in certain trustees on trust for sale under a will of a testator who died in 1917. The testator had been seised in fee simple beneficially and absolutely, subject, however, to two rentcharges

created voluntarily for a long term of years by settlements of 1818 and 1830. In the events which had happened the trustees for sale were the same as the trustees of the rentcharges, both of which operated only in equity. Morton, J., held that the land was settled land and that the trust for sale was not binding by virtue of the outstanding equitable rentcharges. Apparently one of the grounds of his reasoning was as follows. If the fee simple had not been vested in the trustees for sale by accident, it would have been vested in trustees to pay the outstanding rentcharges and subject thereto on trust for the trustees for sale, and in that case the whole legal estate could not have been free from the prior charges, thus applying the principle in *Re Parker's S. E.*, [1928] Ch. 247, which the learned Judge discussed at some length. He was of opinion that the accident of the legal estate being vested in the trustees for sale could not affect the position, and he discussed the opposite case of *Re Norton*, [1929] 1 Ch. 84, where the legal estate had vested in the special personal representatives of a deceased estate owner upon trust to give effect to certain outstanding equities in priority to a trust for sale. No reference appears to have been made to *Re Beaumont's S. E.*, [1937] 2 All E. R. 353 (*ante*, Vol. I, p. 359), where the legal estate was vested in an estate owner entitled beneficially in fee simple subject to rentcharges outstanding under an old settlement. Here the estate owner had a vesting deed executed in his favour prior to a transfer of his fee simple interest to trustees for sale, and Clauson, J., held that the land remained settled land. This last case is differentiated by the existence of the vesting deed in the estate owner, but otherwise they all seem to follow the principle, namely, that where interests have been created by a prior settlement and remain outstanding there can be no "binding" trust for sale, and the discussion of *Re Leigh's S. E.* (*No.* 1), [1926] Ch. 852, contained in *Re Sharpe's Release*, *supra*, points to that as the *ratio decidendi* to be extracted from *Re Leigh's S. E.*, as indeed would be warranted on the facts of the case. *Re Parker's S. E.* (*supra*) makes it clear that the interest may be legal, as in the other cases the interests were in fact equitable. There are observations in *Re Beaumont's S. E.* (*supra*) from which it might be inferred that the intention to create a binding trust for sale is also material as under the old law under the Settled Land Act, 1882 (cf. *Re Johnson*, [1915] 1 Ch. 435), but it seems fairly clear that in the absence of some decisive ruling of the Court of Appeal this can only arise in the absence of the circumstances falling within these decisions. It is suggested that the practical approach is to ascertain whether in

priority to the interest granted to the trustees for sale there are other interests which would fall within the Settled Land Act, 1925, s. 1, and in that event to construe as settled land. If there are no such interests then it may be necessary further to consider whether in the circumstances there was an intention to create a binding trust for sale, but this problem will normally solve itself without difficulty.

Re Sharpe's Release (*supra*) contains some other points of interest. First, there was a separate deed declaring the trusts of one of the rentcharges and the learned Judge refused to hold that this deed constituted one of the instruments constituting the compound settlement on the ground that it was not one of the instruments under which the land " stands for the time being charged with the payment of certain annual sums ". The charge was created by a prior instrument. In the Settled Land Act, 1925, there is no clause defining what instruments constitute a compound settlement. Apparently the approach of the learned Judge lay in ascertaining whether the instrument could affect the legal estate in the land by reference to section 1. Unfortunately, the use of the term " land " in this as in other connections with the Property Legislation of 1925 has led to confusion, and it is clear enough that a rentcharge operating under section 1 of the Act can never affect the legal estate directly. It is suggested with some diffidence that the correct interpretation of this part of the decision lies in ascertaining whether or not an instrument creates an interest which would render the estate in the land settled land for the purpose of section 1. If it does it forms one of the instruments of a compound settlement. If it could not of itself do so, then it does not, and a declaration of trust of a rentcharge could not do so, though it might make the rentcharge, if it subsisted as a legal estate, itself subject to the Settled Land Act.

Secondly, the trust for sale constituted a trust to pay an annuity and to raise a capital sum at such times within ten years as they, the trustees, saw fit for the testator's daughter and subject thereto to the testator's son absolutely. The learned Judge held that the son was not entitled to be estate owner under the Settled Land Act, 1925, s. 20 (1) (viii) as " a person entitled to the income of land under a trust or direction for payment thereof to him . . . until sale of the land ". The refusal of the learned Judge was based primarily upon the decision of the Court of Appeal in *Re Astor*, [1922] 1 Ch. 364, and in particular upon the judgment of Warrington, L.J. In *Re Astor* (*supra*) the land was held upon trust for certain persons if they should attain twenty-one and

failing them upon trust for residuary estate which was vested in certain persons. The Court of Appeal held that during the minority the rents and profits went to the persons entitled to the residue but that they were not persons having the powers of tenant for life under the 1882 Act.

The learned Judge did not explain why he felt himself bound by *Re Astor* (*supra*) which was based on section 58 of the Settled Land Act, 1882. Section 58 does not contain any quite analogous clause to that involved in the 1925 Act, and apparently Warrington, L.J., was concerned primarily to say that the residuary legatees could not be regarded as having an interest for life in the land, nor were they, in his opinion, tenants in fee simple with any executory limitation over; the two alternatives discussed in that case. The learned Lord Justice also pointed out that in fact the trusts as therein declared left it uncertain whether the residuary legatees would receive any interest at all, and furthermore the trustees were placed in such a position with regard to their duties that it was imperative that they should retain control properly to fulfil them. The former of these last two heads seems to present the decision in *Re Gallinga*, [1938] 1 All E. R. 371 (noted *ante*, Vol. II, p. 371). The latter may be substantially the reason for the present decision, since it seems clear that subject to the prior charges the ultimate limitation was a fee simple or absolute interest until sale under the trust and so *prima facie* within section 20 (1) (viii) of the Settled Land Act, 1925.

Finally, the learned Judge held that there were no trustees of the compound settlement and appointed the trustees for sale to be trustees of the compound settlement, subject to an affidavit of fitness. This part of the decision, apparently, follows from the previous point. The trustees of the earlier settlements were not trustees for the purposes of the Settled Land Act, and the trustees of the last instrument creating the compound settlement could not be trustees under section 31 of the Settled Land Act, because that provision only applies where there is a tenant for life or statutory owner. Statutory owner presumably in this connection only includes statutory owners other than trustees of the settlement (see Settled Land Act, 1925, s. 23).

Settled land—improvements—structural additions to mansion house.—Re Insole's Settlement, [1938] 3 All E. R. 406, is a decision of the Court of Appeal, reversing Simonds, J., on the meaning of "structural additions to or alterations in buildings reasonably required" contained in Schedule III, Part II, para. 5

of the Settled Land Act, 1925. The case arose out of buildings erected close to the mansion house consisting of a new glass-house and a range of buildings comprising garages, chauffeur's flat, with an engine room, battery room, boiler house, workshop and potting shed. The whole with the mansion house, in the words of Greene, M.R., constituted "a group which is familiar in domestic architecture in this country". The tenant for life sought to have the expense borne out of capital moneys, and this claim was allowed by the Court of Appeal.

Greene, M.R., in whose judgment the other members of the Court concurred, adopted as the guiding principle the words of Lindley, L.J., in *Re Gerard's S. E.*, [1893] 3 Ch. 252, on an analogous provision in the 1882 Act, namely, rebuilding the principal mansion house. Lindley, L.J., said, at pp. 260, 261: "Whether stables can or cannot be regarded as part of the principal mansion house is a question of fact in each particular case. In some cases I think they can. In some cases I am clear they cannot. All stables cannot be regarded as part of the principal mansion house—that is perfectly obvious. On the other hand, stables may be so connected with it, not merely physically, but by occupation, enjoyment and propinquity, as to fall within the expression 'rebuilding the principal mansion house'. In this particular case it may be that the old stables were so used for the purposes of the mansion house and were so near to it that they could be fairly regarded as part of the principal mansion house." Greene, M.R., said, at p. 408: "The whole group of buildings, when completed, must be looked upon and considered, and regard must be had to the relationship of the buildings to one another, their use, and so forth. I am not suggesting for a moment that in that examination the question of physical farness or nearness is not a relevant consideration. It is a relevant consideration, but, in my opinion, it is not the only consideration." The test of "domestic architecture" mentioned earlier seems the epitome of the problem and from the words of the learned Master of the Rolls it would appear that an actual addition to the house, if made for some collateral purpose, *e.g.*, a club room, might conceivably not be a structural addition, but this must remain for decision. As the authority now stands there seems adequate scope for a reasonable discretion on the part of the Court since the requirement of contiguity has been removed.

Settled Land Act—investments of proceeds of sale—personalty.—Re Cartwright, [1938] 3 All E. R. 391, may come as a surprise to

many practitioners although the actual point of the decision will not often arise in practice, but its implications may be much wider. The short point was whether a will made in accordance with Lord Kingsdown's Act, 1861, s. 1, enabling a will of personalty made by a British subject irrespective of his domicil to be made according to the law of the place where made, would be valid to pass investments other than land constituting the trust property of a settlement under the Settled Land Act, 1925. Bennett, J., held that "the Settled Land Act, 1925, s. 75 (5), does not, in my judgment, operate to convert into real estate the securities in which capital moneys have been invested". Hence he held that such securities were personalty and fell within the provisions of Lord Kingsdown's Act.

In coming to this conclusion the learned Judge found himself able to disregard the opinions expressed in the Court of Appeal in *Re Twopenny's Settlement*, [1924] 1 Ch. 522, concerning the analogous provision contained in the 1882 Act on the ground that prior to 1926 real and personal property devolved differently on intestacy and the 1882 Act provided that the securities should devolve as land. Now that intestate devolution is the same, the same provision "has now no such operation. It is in fact inoperative. It seems to me, therefore, that this basis for the opinions expressed in *Twopenny's Case* having disappeared, these opinions can no longer be used for the purpose" of construing a conversion (see *per* Bennett, J., at p. 397).

This case offers another warning against reliance on the interpretation of analogous sections in the new and old law where the circumstances have been changed in any way. In fact the circumstances seem usually to have been changed in connection with settled land. But the immediate application of the decision seems to be that whereas a statutory trust for sale automatically converts beneficial interests in land into personalty (*Re Kempthorne*, [1930] 1 Ch. 268), the Settled Land Act does not preserve the character of realty in the trust estate. Presumably it will depend upon the precise character of the several parts of the trust fund at any relevant date to decide whether or not it is personalty. It is to be noted that this character will depend upon the wishes of the person or persons having the powers of tenant for life for the time being.

If this case is carried to its logical conclusion it will mean that, apart from any interference with the beneficial interests limited under the settlement, which are clearly preserved by section 75 (5) (see *per* Bennett, J., at p. 397), the interests in the securities forming part of the trust property of the settlement must be

treated as personalty. Most of the hardships arising from the doctrine of conversion have been obliterated by the changes in the law, particularly in the law relating to intestate succession effected by the Property Legislation of 1925. All the effects of conversion have not been eliminated, however, as is illustrated by the case noted, and there are others. In connection, therefore, with dispositions not affecting beneficial interests under the settlement this principle must be borne in mind. One obvious example of the problems that may arise is the question of derivative settlements, where the whole of the settled land is sold prior to the determination of the original settlement. It would appear that in such a case it becomes very doubtful whether such a settlement falls within the Settled Land Act at all. This would have some peculiar results as, for example, that the Trustee Act, 1925, s. 32 (power of advancement) would be applicable, but the powers under the Settled Land Act would not. It is felt that this decision cannot be left where it is, but that further decisions will be necessary to clarify the position on other matters.

Mortgage — right of mortgagee in possession to appoint a receiver.—Refuge Assurance Co. v. *Pearlberg* [1938] 2 All E. R. 25 (*ante*, Vol. II, p. 374), has been upheld on appeal, [1938] 3 All E. R. 231, that a mortgagee in possession may appoint a receiver under his statutory power under the Law of Property Act, 1925, ss. 101 (1) (iii) and 109 (1). Greene, M.R., in his judgment, concurred in by the other members of the Court, put the matter this way (at p. 234): "When one comes down to the basis of the matter, it is a question of the construction of this provision in the Act of Parliament. Is it or is it not proper or necessary to read into that provision some implied term, qualification or proviso? Is there any doctrine of equity which compels us to do that, or is there any doctrine of equity which compels us, if it is not to be read in, to deprive the mortgagee of the rights which, as a matter of construction, the statute gives to him? I know of no such doctrine."

This observation may well be noted with regard to other statutory provisions where attempts are being made to read in something that is not there.

Mortgage—right to redeem—perpetuity—clog on equity—debenture.—Knightsbridge Estates, Ltd. v. *Byrne*, [1938] 2 All E. R. 444, will rank as an important case on the right to redeem,

not only for its intrinsic decision but also for the careful analysis of the authorities contained in the judgment. The Knightsbridge Estates Co., Ltd., incorporated under the Companies Acts, 1908 to 1917, carries on business in connection with the acquisition, ownership and management of real estate. On the security of estates involving various properties the company borrowed, by a mortgage dated 1931, £310,000 from the trustees of the Royal Liver Friendly Society, the sum to bear interest at 5¼ per cent. and to be repayable by eighty half-yearly instalments. There was no proviso for redemption at an earlier date and the mortgage contained certain restrictive clauses such as that no sale or lease of the property was to be made without the written consent of the mortgagees. The company claimed now to repay the capital on six months' notice. For the society it was contended that the money could only be repaid in accordance with the terms of the deed, that is to say, that redemption could only be completed after forty years from 1931. The company contended that this proposition could not be supported on the ground, first that a right to redeem so postponed was void for perpetuity, and secondly that it was a clog on the equity, but the society replied that the perpetuity rule did not apply and that in any event the mortgage was a debenture and could be made irredeemable under the Companies Act, 1929, s. 74. Luxmoore, J., held (i) as a matter of construction that under the deed there was no right to redeem until the completion of forty years; (ii) that the perpetuity rule did not apply to the postponement of the right to redeem; (iii) that on the facts the postponement was a clog on the equity to redeem; and (iv) that the mortgage was not a debenture, and hence the company was entitled to a declaration that the mortgage could be redeemed on giving six months' notice.

(i) The date of redemption is a question of construction upon the deed. There was no covenant by the company that they would not repay at an earlier date, but there was a covenant not to call in by the society if the provisions of the mortgage deed were complied with. In the absence of any date fixed for redemption then the learned Judge held that there was no right to redeem at an earlier period. This aspect of the decision is of considerable importance in view of the common tendency, particularly in building society mortgages repayable by instalments, to insert no proviso for redemption. The effect of adding a clause, as is not infrequently done, that the whole sum can be repaid, provided that certain additional payments are made, was not before the Court, and gives rise to obvious difficulty.

The fact that the day for redemption is postponed to the end

of the instalments has certain practical applications apart from the obvious disadvantage from the point of view of the mortgagor. In particular it affects the statutory powers of the mortgagee. The powers of sale and appointing a receiver only arise when the mortgage money becomes due : Law of Property Act, 1925, s. 101 (1). Although a purchaser is not concerned to see that a case for sale has become exercisable, he is concerned to see that the power has arisen: cf. Law of Property Act, 1925, s. 104. In *Payne* v. *Cardiff R. D. C.*, [1932] 1 K. B. 242, it was held that where there was no date for redemption but the principal was repayable by instalments, the principal money became due within the meaning of the Law of Property Act when one instalment was overdue. The difficulty seems to be this. The power of sale arises only when the money is due, and apparently in mortgages repayable by instalments when the instalment is overdue. Consequently a purchaser from a mortgagee is concerned to see that the instalment is overdue, or the power of sale will not have arisen. This puts an additional burden on the mortgagee when selling as against the mortgage with a fixed date for redemption and a covenant not to call in when repaid by instalments. An appropriate clause in the contract may be advisable. Where the instalment mortgage also contains special powers to sell, etc., when the instalment is overdue only a month, or as the case may be, there is the further difficulty that no protection may arise under section 104 of the Act. This, however, does not arise in connection with this decision and normally if the vendor proves that the power has arisen, he will also show that the power is exercisable.

(ii) The application of the perpetuity rule to the right to redeem appears never previously to have been decided. This may be due in part to the common confusion between the right to redeem and the equitable interest called the equity of redemption. The latter is clearly a vested interest in the mortgagor and therefore a question of perpetuity could not arise. The learned Judge, after discussing the observations in *Gray on Perpetuities* and Halsbury, preferred to treat mortgages as an exception to the Perpetuity Rule rather than make a detailed analysis of the reasons for excluding it which might lead to confusion, though, in fact, he did hold that the condition in defeasance of the term created by the mortgage did not infringe the perpetuity rule (see at p. 454). It is felt that this interesting statement concerning the right to redeem and the powers given to the mortgagee in a mortgage deed needs no elaboration. It is very unlikely that it will be questioned, and the precise reason of exclusion is academic.

(iii) The decision that the postponement of redemption for forty years was a clog on the equity involved the learned Judge in a discussion of a number of the leading cases. No purpose will be served by a repetition of those cases in this note as they are familiar in the books. Attention, however, may be drawn to *Davis* v. *Symons*, [1934] Ch. 442, where Eve, J., held that in a mortgage of land together with an endowment policy the mortgagee covenanted not to call in and the mortgagor not to pay off for twenty years, this period was a clog on the equity of redemption. In this mortgage there was a condition that the mortgagor would not sell the equity of redemption except to a responsible person. The real issue must, it is felt, be one largely of fact. There are two essential elements, namely, the length of time for which the right to redeem is postponed, and secondly, any collateral conditions which affect the disposition of the property prior to the date of redemption. On the first hand, there is no doubt that the Courts take a lenient view of the length of time, provided that the parties are *sui juris* and there is no suggestion of oppression : see Eve, J., in *Davis* v. *Symons* (*supra*), at p. 448, cited in the case under discussion. This is provided that there is a mutual covenant which prevents the mortgage money from being called in by the mortgagee. On the other hand, collateral conditions operating to restrict dispositions by way of sale of the equity of redemption or lease of the premises are regarded more strictly. This is a true clog on the equity of redemption, since it limits the enjoyment of the equity of redemption, which, if the right to redeem is postponed during a long period, will operate to deprive the owner of his property in a greater or less degree.

This suspension of the right to redeem is of course only one aspect of the law relating to clogs on the equity. It does not apply, and the cases in it are not direct authority, where there is (i) a stipulation providing that the mortgagor may in certain circumstances lose his property to the mortgagee : see *Salt* v. *Marquis of Northampton*, [1892] A. C. 1, *Samuel* v. *Jarrah Timber Co.*, [1904] A. C. 323; this can never be valid : or (ii) a collateral stipulation by way of additional advantage to the mortgagee : see *Kreglinger* v. *New Patagonia Meat Co.*, [1914] A. C. 25; *Noakes* v. *Rice*, [1902] A. C. 24, where greater latitude appears to be allowed.

(iv) The problem, whether a mortgage of a company is a debenture, is one primarily of company law, but the point is of importance, because a debenture can be irredeemable : Companies Act, 1929, s. 74. The learned Judge did not decide what constituted a debenture but held that securities created by companies

could be either mortgages, or charges, or debentures, and that debentures did not include all mortgages. This mortgage he held not to be a debenture.

Highway—presumptive dedication—"enjoyed as of right."—Jones v. *Bates*, [1938] 2 All E. R. 237, is a case which should be read with care, since undoubtedly the problem of public footpaths is increasingly important owing to the development of agricultural land for building. The question is almost entirely one of fact, and in this case a new trial was ordered (Farwell, J., dissenting) on the ground that the County Court Judge had misdirected himself concerning the relevance of the facts before him. It is not necessary or possible in a short note to deal with the facts, but the evidence of user raised two principal difficulties. First, the user was intermittent, and secondly it appears to have been limited in character. Primarily the problem was the meaning of the expression in the Rights of Way Act, 1932, s. 1 (1), "actually enjoyed by the public as of right and without interruption". Both Slesser, L.J., and Scott, L.J., held that the meaning of user as of right was to be interpreted in the language of Tomlin, J., in *Hue* v. *Whiteley*, [1929] 1 Ch. 440, at p. 445, as "believing themselves to be exercising a public right to pass from one highway to another". Both learned Judges so construed the meaning to be attached to the language of Hilbery, J., in *Merstham Manor* v. *Coulsdon*, [1937] 2 K. B. 77, at p. 83, where he said: "not secretly, not as acts of violence, not under permission from time to time". Scott, L.J., was even more particular, and said (at p. 245): "I do not think that Parliament borrowed the words 'as of right' from the law of easements"; a view not shared by Farwell, J. (see at p. 251). No onus is on the public to disprove that there were acts of violence, secrecy, or permission.

The other point of law was the meaning of the words "without interruption", and on these Scott, L.J., said (at p. 246) a mere absence of continuity in the *de facto* user proved will not prevent the statute from running: there must be an interference with the enjoyment of the right of passage. The learned Judge did not explain what form that interference must take.

Since the decision so largely turned upon the questions of fact and whether or not a new trial should be ordered, it is not perhaps the clearest expression of the law. It was not necessary for the Court precisely to determine these points, and the learned Judges appear to have held somewhat divergent views. The case must, therefore, be referred to in detail, but it is thought that the law will require further exposition before it can be described as definite.

Highways—conveyance—nuisance.—Att.-Gen. v. *Wilcox*, [1938] 3 All E. R. 367, is of particular interest to conveyancers with regard to frontagers' rights to the soil of a highway. It is familiar learning that a conveyance of land abutting on a highway or non-tidal river passes the adjoining half of the highway or river bed (see *Norton on Deeds*, pp. 252 *et seq.*). This is subject to a contrary intention appearing in the grant, and this case shows what will, on building estates at least, be the commonest example of contrary intention. The facts were that there was a conveyance of land abutting upon a towpath on Thames side, and it had already been held by the Court of Appeal in *Thames Conservators* v. *Kent*, [1918] 2 K. B. 272, that the public were entitled to go on and pass along the towpath on foot for all purposes of profit or pleasure or with horses or other draught animals for the purposes of towing. The grantees had planted certain posts in the towpath with a view to preventing vehicular traffic from using the towpath, but it was held as a fact that such posts also obstructed the use of towropes. The conveyance did not purport directly to convey any part of the towpath since it described the land as bounded by the towpath and there was an addition in the parcels of "together with" a right of way for all purposes over the towpath. Farwell, J., held that apart from the express grant of way there was a presumption of a grant of half the soil in the towpath (see *Thames Conservators* v. *Kent*, *supra*), but that the express grant of way rebutted this presumption since it was unreasonable to grant a way over a man's own property. The interest of this decision lies principally in its application to the right in the soil of roads constructed on building estates. It is a common practice in these cases not to convey any of the soil in the road abutting the frontages of the houses sold directly but to include a grant of way over the road in common with the other frontages. In the light of this decision this would leave the soil vested in the estate company. When, as frequently happens after the development of the estate, the company is wound up, it remains a difficult problem to know in whom the estate vests (see Williams, *Vendor and Purchaser* (4th ed.), pp. 929—931). The question of ownership has importance both in the question of the rights of the owner against third parties (see *Clerk & Lindsell* (9th ed.), pp. 419—420), and, perhaps, more importantly in the question of liability.

Farwell, J., also held that the posts constituted a nuisance to the highway because as such they impeded the use of a tow-rope, and it is important to note that in considering whether or not there was a nuisance the learned Judge held that he was entitled to

consider the benefit to proper users, *i.e.*, pedestrians, and the hindrance caused to improper users, *i.e.*, vehicular traffic. *Prima facie* a post must be an obstruction and so a nuisance, but in arriving at the existence of a nuisance benefit as well as burden must be considered.

Mines — reservation of express easements — right to implied grant.—Re Wilson Syndicate Conveyance, [1938] 3 All E. R. 599, may be noted simply for the principle of construction applied. In a conveyance the grantor thereby reserved the mines and minerals under the land "together with all necessary powers, rights and easements for searching for, winning, working and carrying away the same by underground working". The plaintiff, who was an assignee of the reservations from the original grantor of the land, claimed the right to use the surface for getting the minerals. Bennett, J., held that the plaintiff could not succeed. Although, where there is a reservation of mines and minerals, there is an implied reservation of all necessary easements and other rights necessary to get the minerals including user of the surface, the learned Judge found that the express reservation of a more limited right to get them underground excluded any easements over the surface. He distinguished *Cardigan* v. *Armitage* (1823), 2 B. & C. 197, and *Stukeley* v. *Butler* (1614), Hob. 168, on the ground that in those cases the express grant was not in nature restrictive of the implied grant.

Power of appointment — fraudulent exercise. — Re Nicholson's Settlement (see *ante*, Vol. II, p. 258) has been affirmed on appeal, [1938] 3 All E. R. 532. This was the case in which an elderly lady with a power to appoint in favour of a husband married very late in life because the persons entitled in default would not make an arrangement to benefit certain friends of the appointor. In the circumstances Farwell, J., had held that as there was no evidence of any bargain with the appointee there was no fraudulent appointment, whatever the hopes of the appointor that the appointee would in fact benefit parties not the objects of the power. The learned Judge had drawn a distinction between a power in favour of a single object and a power of selection between several objects. Clauson, L.J., who delivered the judgment of the Court also emphasised this distinction, and it would seem clear that the cases on fraudulent exercise cannot be regarded as generally applicable to both classes, at least so far as concerns the necessary evidence

of fraud for the purpose of avoiding the exercise. It is not suggested, however, that any arrangement or bargain with an appointee, a sole object, to benefit parties not objects of the power would not invalidate such appointment if the arrangement or bargain were proved: see *per* Clauson, L.J., at p. 534.

Power—excessive exercise—condition affecting share of residue.—In *Re Neave's Settlement*, [1938] 3 All E. R. 220, a testator by his will exercised a special power of appointment in favour of children for the benefit of two sons absolutely, who also were to benefit under the residuary gift by way of settlement. The appointment contained a condition that the appointees were to settle the amounts appointed in accordance with the settlement of the residue and in default of such settlement the trustees of the will were to decide in what amount and manner compensation was to be made for their failure. Farwell, J., held that the condition was invalid. The testator had no power to make a settlement by way of appointment which would have been void as an excessive appointment. The testator had no right in law to give to the trustees of his will the power, except by way of a power of appointment, of determining the destination of his residuary estate. Hence, he held that the sons took an absolute interest under the appointment.

The learned Judge pointed out that the case illustrated the importance of the distinction between property and power. Under a power it is possible only to dispose of the property provided the disposition keeps within the precise limits of the power. In the case of property it is possible to make any disposition provided that it obeys the general rules of law. It is to be noticed that if an invalid condition is contained in the exercise of a power and not, as here, superimposed after it, the appointment itself would fail. It is also to be observed that a provision that the trustees of a will may in their discretion determine how the residuary estate should go is invalid, in contradistinction, of course, to a discretionary trust of income. It is one of the limits on the unfettered right of disposition of property.

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2. *LANDLORD AND TENANT CASES.*

By LIONEL A. BLUNDELL, LL.M., Barrister-at-Law.

Distress—bailiff in walking possession—no power to charge for man in possession.—The decision of the Court of Appeal in *Day* v. *Davies* (1938), 54 T. L. R. 488, is of great importance to all taking part in distress proceedings.

A bailiff levied distress and the tenant entered into a written agreement with him for " walking possession " and agreed to " pay all costs ". Thereafter the bailiff merely visited the premises for a few minutes each day; but he charged the 6s. a day for a " man in possession " prescribed by paragraph 2 of Scale II of Appendix II of the Distress for Rent Rules, 1920.

The Court of Appeal held that the charge was not recoverable. By rule 22 of those Rules no person is entitled to fees, charges, or expenses for levying a distress or for doing any act or thing in relation thereto other than those specified in and authorised by the scale of charges. And it was pointed out by Slesser, L.J., that there was likewise a prohibition in the Distress (Costs) Act, 1817, s. 1, against making any charge for any act mentioned in the schedule to that Act, " unless such act shall have been really done ". In that Act the material words were " man in possession, per day, 2s. 6d." Nowhere, however, is any charge authorised to be made in respect of mere " walking possession ". On the other hand, the acts of constructive possession definitely were acts done in relation to the distress. It followed that, there being no man in real possession, the statutory prohibition applied and no charge could be made, not even by agreement with the tenant. In this latter respect *Day* v. *Davies* departs from the *dicta* of A. L. Smith, L.J., and Chitty, L.J., in *Lumsden* v. *Burnett*, [1898] 2 Q. B. 177; 67 L. J. Q. B. 661, where it was suggested that the tenant could make a binding agreement to pay a sum of money to avoid the inconvenience of having a man in real possession. Now the Court of Appeal has definitely laid down that the tenant cannot in that way waive the benefit of the statute, which prohibits any charge in relation to the distress other than those authorised by the scale of charges.

No implied condition or undertaking as to safety of demised premises—dangerous tree overhanging from landlord's land.—The

general rule of law is that upon a demise there is no implied undertaking as to the condition, suitability or safety of the premises demised. So it was laid down, for example, in *Robbins* v. *Jones* (1863), 15 C. B. (N.S.) 221. And Sir George Mellish, L.J., stated the principle in the following words in *Erskine* v. *Adeane* (1873), L. R. 8 Ch. 756, at p. 761 : " The law of this country is that a tenant, when he takes a farm, must look and judge for himself what the state of the farm is. Just as in the case of a purchaser of a business the rule is *caveat emptor*, so in the case of taking the lease of property the rule is *caveat lessee*; he must take the property as he finds it."

The exceptions to this rule are limited in number. On a lease of a furnished house, there is an implied warranty of fitness for occupation (see *Smith* v. *Marrable* (1843), 11 M. & W. 5); and under section 2 of the Housing Act, 1936, there is implied in every contract for letting a dwelling-house falling within certain low rental limits a condition and undertaking on the part of the lessor that the house is and will be kept reasonably fit for human habitation. And it would seem, upon the principle of *Perry* v. *Sharon Development Co.*, [1937] 4 All E. R. 390 (see note in this volume, at p. 177), that in a lease of a dwelling-house entered into while the house is in course of erection, there is to be implied an undertaking that the house when completed shall be fit for occupation. But these specific exceptions are strictly limited, and the general rule as laid down in *Erskine* v. *Adeane* and other cases cannot be questioned.

A classic statement of the rule as applied to houses is, of course, the speech of Lord Atkinson in *Cavalier* v. *Pope*, [1906] A. C. 428, where he says (at p. 432) : " It is well established that no duty is, at law, cast upon a landlord not to let a house in a dangerous or dilapidated condition, and further, that if he does let it while in such a condition, he is not thereby rendered liable in damages for injuries which may be sustained by the tenant, his servants, etc."

Another application of the rule is illustrated by *Shirvell* v. *Hackwood Estates Co., Ltd.*, [1938] W. N. 130; 54 T. L. R. 554; 82 S. J. 271; [1938] 2 All E. R. 1, a recent case in the Court of Appeal. In that case a farm was leased, and on adjoining land retained by the lessor there was a partly dead tree which overhung the land demised. A dead branch fell and killed a workman employed by the lessee. The lessee sought to recover from the lessor the compensation due under the Workmen's Compensation Act, 1925, but it was held that the lessee had taken the farm as it existed at the time of the lease, and the lessor was under no

duty to him to see that any overhanging trees were not in a dangerous condition. This decision follows that in *Cheater* v. *Cater*, [1918] 1 K. B. 247; 87 L. J. K. B. 449, where under somewhat similar circumstances the landlord was held not liable for the loss of the tenant's mare, which died from eating yew branches overhanging from adjoining land retained by the landlord.

What constitutes an improvement—considerations as to whether withholding of consent is reasonable.—It is clear that the Landlord and Tenant Act questions raised in the litigation between *Lambert* and *F. W. Woolworth & Co., Ltd.*, cannot be regarded as finally and satisfactorily determined until they are settled by the House of Lords. In the meantime, the decision of the Court of Appeal in *Lambert* v. *F. W. Woolworth & Co., Ltd.* (*No.* 2), [1938] W. N. 199; 54 T. L. R. 806; [1938] 2 All E. R. 664, marks a further stage forward towards such determination. Once again, the Court of Appeal is divided in its opinion, but the majority follow the same line of reasoning as was preferred by the majority of a differently constituted Court of Appeal on the previous occasion when the same parties were before the Court.

The note which follows should be read in conjunction with the notes which have already appeared in this journal on the earlier Court of Appeal decision in *F. W. Woolworth & Co., Ltd.* v. *Lambert*, [1937] Ch. 37; 106 L. J. Ch. 15 (see *The Conveyancer*, Vol. 1, pp. 82-84), and on the decision of Simonds, J., in *Lambert* v. *F. W. Woolworth & Co., Ltd.*, [1937] W. N. 269; 106 L. J. Ch. 269 (see *The Conveyancer*, Vol. 2, pp. 83-85), now varied by the Court of Appeal.

The first issue raised on the appeal was whether certain works desired to be carried out by the tenants were improvements to the demised premises within the meaning of the Landlord and Tenant Act, 1927, s. 19 (2), which is the sub-section providing that consent to improvements must not be unreasonably withheld. The works involved the conversion of the demised premises, together with adjoining property of which the tenants had secured a lease, into one composite shop; the shop at present existing on the demised premises would lose its identity, the back wall would be pulled down, and other material alterations would be made. On the previous occasion when the point had come before the Court of Appeal, a majority (consisting of Lord Wright, M.R., and Romer, L.J.) expressed the view that such works were improvements within the meaning of the section, the test adopted being the question, how can the tenant get, consistently with the other conditions of

the lease, the most beneficial user of the premises as premises? On the other hand, Greene, L.J., took the view that the proposed works, while they might be beneficial to the tenant and might be an improvement to the composite premises regarded as a whole, could not be described as an improvement to the demised premises. These expressions of opinion were merely *obiter*, the case being actually decided upon another ground, although they were later regarded by Simonds, J., as binding upon him in a Court of first instance.

In the second appeal now heard by the Court of Appeal, the question actually fell to be decided, and again a majority of the Court of Appeal has held the proposed works to be an improvement, Slesser and MacKinnon, L.JJ., both taking this view. The strength of the argument in favour of this construction would appear to lie in the fact that the latter part of the sub-section provides that the landlord may require as a condition of his licence or consent the payment of a reasonable sum *in respect of any damage to or diminution in the value of the premises* or any neighbouring premises belonging to the landlord, and may also require, *where the improvement does not add to the letting value of the holding*, an undertaking by the tenant to reinstate the premises. Slesser, L.J., says: "From these words it follows that the section contemplates that an alteration may be an improvement although it produces damage or diminution in the value of the premises, or does not add to the letting value of the holding, so that the mere fact of damage or diminution in the value arising to the premises from their alteration will not of itself necessarily prevent the alteration from being an improvement. In other words (as the Court has by a majority, I think, already decided), the question whether or not the alteration is an improvement must be regarded from the point of view of the tenant."

Greer, L.J., took the opposite view and agreed with the judgment delivered by Greene, L.J., upon the previous appeal. The view preferred by Greer and Greene, L.JJ., may perhaps best be summarised in the words of Greene, L.J., at p. 64, in [1937] Ch.: "The true test, I suggest, is this, that the improvement must be an improvement to the premises which are the subject-matter of the covenant and not merely an improvement which derives its character, as such, from its effect and result upon some composite building." The alternative construction preferred by the majority of the Court of Appeal certainly extends to the tenant an astonishingly wide power.

The majority of the Court having held that the proposed works constituted an improvement, the second question then arose as to

whether consent thereto had been unreasonably withheld. The lessees, in applying to the landlords for a licence to make the alterations, had offered (i) an undertaking to reinstate the premises upon the determination of the lease; (ii) provision of security for the performance of the undertaking; and (iii) an undertaking to pay all costs and expenses. They did not offer to pay any sum for damage to or diminution in the value of the premises. The landlords refused their consent; they did not put forward any proposal for the payment by the lessees of any particular sum by way of compensation, nor did they make any proposal for the assessment of compensation by any tribunal. Simonds, J., had held that the landlords were justified in simply considering upon its merits the proposal put forward by the lessees and rejecting it if it was inadequate (see *The Conveyancer*, Vol. 2, p. 84). The majority of the Court of Appeal have now overruled this part of the decision of Simonds, J. The view taken by Slesser and MacKinnon, L.JJ., is that although the onus of proving that the withholding is unreasonable is on the tenant, yet, if the landlord gives no reason, but merely refuses, that in itself puts upon him the duty of showing that his action was reasonable. "The refusal is unreasonable if no grounds are given at all and none can be shown." The Court of Appeal held that in this case there was nothing to support "a finding of absence of unreasonableness". The rule now laid down by the Court is that in a case where the tenant's proposal does not offer the landlord adequate compensation for damage to his premises, it is not sufficient for the landlord simply to consider the proposal on its merits and reject it. If the landlord's objection is on the ground of pecuniary damage only, that is not, according to the Court of Appeal, a reasonable ground for refusing consent absolutely; the landlord must avail himself of the proviso in the section entitling him to require as a condition of his consent the payment of a reasonable sum by way of compensation. It is suggested by MacKinnon, L.J., that where the landlord is in difficulty as to putting an exact price upon the damage, compensation should be demanded in the following form: "We give our consent provided you pay a reasonable sum, and we are advised and consider that £X is such a sum." He must, however, name a sum which he requires as compensation for the damage.

It will be observed that the rule now laid down by the Court of Appeal is directly contrary to that previously laid down by Simonds, J. It must be admitted, upon a consideration of the words of the sub-section, that the statute lends itself readily to either interpretation.

3. *WILL CASES.*

By S. J. Bailey, LL.M., Barrister-at-Law.

Administration—deceased's uncompleted enforceable contract—duty of personal representative to complete—extent of duty to compromise onerous contracts—incidence of cost of completion.—The material facts in *Ahmed Angullia* v. *Estate and Trust Agencies (1927), Ltd.*, [1938] A. C. 624, P. C., were as follows. One Yoosuf died, leaving a will which purported to appoint the appellant as his executor. The appellant obtained probate; but four years later the grant was revoked because the alleged will had not been duly executed. Meanwhile, the appellant had paid to a builder, out of the deceased's estate, moneys which the deceased had contracted to pay for the building of shops upon certain land. The deceased had settled this land, by *inter vivos* settlement, upon himself for life with remainder to his son; and the building of the shops was not completed until after his death. The question for decision was whether the appellant was entitled to credit himself, in his account, with the sums thus paid *qua* executor to the builder. The Judicial Committee, reversing the Court below, held that he was. Counsel for the respondents argued that the appellant should have refused to allow the buildings to be completed, or have endeavoured to arrange a novation casting the obligations of the building contract upon the persons entitled to the land, since any damages or compensation thereby payable would probably be less costly to the estate than the moneys due under the contract; and that the onus lay upon the appellant to justify his failure to take such steps. Their Lordships held, however, that *prima facie* it is the duty of a legal personal representative to perform all contracts of the deceased that can be enforced against him, whether by way of specific performance or otherwise; that it can never be his duty to break such an enforceable contract; and that, although if the contract is onerous he ought not to neglect any opportunity which presents itself of coming to some arrangement with the other party advantageous to the estate, the onus of proving that such an opportunity existed lies upon those who question his conduct in the matter.

In examining the judgments of the Courts below, their Lordships (*per* Lord Romer) paid much attention to a collateral question. In *Cooper* v. *Jarman* (1866), L. R. 3 Eq. 98, one of the personal representatives of an intestate had paid out of the personal estate moneys due under a building contract completed after the intestate's

death, and was held entitled to have done so. In fact he was also the intestate's heir-at-law; and this, aided by a defective head-note, has given the impression that an heir-at-law was entitled, *as such*, to require the personal estate to bear the cost of completing contracts made by the deceased for buildings to be erected on his land. In *Holt* v. *Holt* (1694), 2 Vern. 322, this had indeed been decided; but the grounds for the decision are obscure. Moreover, in *Re Day*, [1898] 2 Ch. 510, a testator contracted with builders to build a house upon his wife's land and some cottages upon his own land, and then died before the buildings were completed, having devised his own land to his wife for life. North, J., decided that the wife could compel the deceased's executors to pay out of his personal estate the cost of completing the cottages on the land devised to her, but not for the house to be built on her own land. The Judicial Committee found it unnecessary to express any opinion on this decision, but appeared to doubt it. Although, therefore, executors are ordinarily entitled to complete such contracts, it is not altogether certain that a devisee of the land affected can require them to do so at the cost of the remainder of the estate. (Cf. *Re Tann* (1869), 7 Eq. 434, where the cost of a testator's uncompleted agreement for partition was held to be a charge on the land concerned as against his devisees.)

Administration—annuities and pecuniary legacies—deficiency of assets—payment of actuarial value to annuitants—abatement—effect of direction or power to set aside a fund.—When a will bequeathes pecuniary legacies and annuities, and contains a residuary gift, various difficulties may arise if the assets, after due payment of debts and expenses, are not sufficient to produce both the legacies and an income sufficient to cover the annuities.

When annuities are thus competing with pecuniary legacies, the actuarial value of the annuities should be ascertained. Thereupon, if the assets are sufficient to pay in full both the pecuniary legacies and the capitalised value of the annuities, the problem is solved; for, in *Re Cottrell*, [1910] 1 Ch. 402, Warrington, J., held that each annuitant may then be paid the actuarial value of his annuity as though it were a pecuniary legacy. Moreover, this can be done despite a direction in the will that the executors should set aside a sufficient fund, from the income of which the annuities may be paid, with a direction to resort if need be to the capital of the fund in case the income thereof becomes inadequate (*ibid.*). On the other hand, it may be found that even if the annuities be

taken at their actuarial value the executors have not sufficient assets to pay both the annuitants and the pecuniary legatees in full. In such a case both must abate rateably—the pecuniary legacies on their face value and the annuities on their actuarial value (*Wroughton* v. *Colquhoun*, 1 De G. & Sm. 357; *Long* v. *Hughes*, *ibid.*, 364). Hitherto it was thought that this principle applies only when the estate is being administered under an order of the Court (*Williams on Executors*, 12th ed., p. 980; *Theobald on Wills*, 8th ed., p. 566); but Simonds, J., has now decided that this belief was ill-founded—*Re Brouncker*, *Mairis* v. *Mandeville*, [1938] W. N. 147.

The question remains whether similar principles apply where annuities are merely competing with each other and with a residuary gift—not with pecuniary legacies. Such was the problem in *Re Cox*, *Public Trustee* v. *Eve*, [1938] Ch. 556; [1938] 1 All E. R. 661. There the will gave priority to the pecuniary legacies, which were accordingly paid in full; but the remaining assets were inadequate to produce from income certain annuities given by the will. The will empowered the trustees to set aside a sufficient fund, whereof the income, and if need be the capital, was to be applied to paying the annuities. A power thus to resort to capital may give an elderly annuitant an unfair advantage over others, for he is the more likely to obtain his annuity in full. The Court therefore favours an actuarial valuation of each annuity, and the payment to each annuitant of the capital sum thereby ascertained —with rateable abatements if the assets are insufficient. This principle had already been applied in cases where the trustees were *directed* to set aside a fund as above, and the assets were insufficient to produce the full actuarial value of the annuities. Now, in *Re Cox*, the same principle is held applicable where the trustees are given a mere *power* to set aside such a fund, and whether or not the assets are insufficient to pay the full actuarial value of the legacies. Thus, the general rule that a gift of an annuity, with a direction to set aside a fund to secure it, does not entitle the annuitant to claim the capital value of his annuity (*Wright* v. *Callender*, 2 D. M. & G. 652), appears to be inapplicable when several annuities are given which together exceed the income from the available assets.

In all these cases, however, it would seem that the question is partly one of construction. If, therefore, the testator's paramount intentions would be defeated by taking the annuity at its actuarial value and paying that amount, rateably abated if need be, to the annuitant outright, some different method will be adopted. Such was the case in *Re Nicholson*, *Chadwyck-Healey* v. *Crawford*,

[1938] 3 All E. R. 270. There the will directed that a fund be set aside sufficient, at the date of appropriation, to meet the annuity and incidental expenses from income; the annuitant was empowered to resort to the capital of the fund should its income subsequently prove to be insufficient; and so much of the capital as should remain, after the death of the annuitant, was bequeathed to a charity. There was a deficiency of assets. Clearly the charity would be completely deprived of its legacy if the direction to set aside a fund were ignored and the annuitant given the capitalised value of his annuity. Accordingly, Crossman, J., decided (the head-note notwithstanding) that the fund directed to be appropriated—not the actuarial value of the annuity—should be taken and should abate rateably with the pecuniary legacies. The abated fund should then be invested and the annuity paid annually therefrom *in full* (free of duty and tax as directed by the will), exhausting the capital in so far as the income was inadequate. On the death of the annuitant, so much of the fund as remained would thus be available for the charity. The charity's contention that the annual payments to the annuitant from the abated fund ought to abate in its favour was unsuccessful; for the annuitant's express power to resort to capital showed that his rights against the fund were intended to have priority.

Assets of deceased—life policy taken out by deceased for the benefit of another—whether intended beneficiary entitled in equity or under the Law of Property Act, 1925, *s.* 56—*premiums paid by intended beneficiary mistakenly believing himself entitled—lien on policy moneys.*—An insurance policy is a contract between the assured and the insurers. Ordinarily, therefore, only the assured or his personal representatives can claim payment of the sum assured. In *Re Engelbach's Estate*, [1924] 2 Ch. 348, Romer, J., applied this rule to a policy taken out by the testator for a sum to be paid in twenty-one years if his infant daughter so long live. Although, by the policy, the moneys were expressed to be payable to the daughter or her personal representatives or assigns, this gave her no legal or equitable interest. Nor does a statement in the proposal form that the proposer is making the proposal "for" (or "for the benefit of") his daughter suffice to show that he became a trustee of the policy or contracted as her agent. In *Re Sinclair's Life Policy*, [1938] 3 All E. R. 124, the above decision was followed by Farwell, J., where the deceased took out a "child's endowment policy" on his own life for the benefit of his infant god-child.

Here again the insurers contracted, in the policy, to pay the policy moneys at maturity to the child if surviving, and to return the premiums to the assured if the child died before the policy matured. There was also power for the assured to surrender the policy if he chose to do so. Farwell, J., held that there was no sufficient evidence that the deceased assured had constituted himself a trustee of the moneys to be payable under the policy : they therefore formed part of his estate, and his executor was under no duty to pay them to the god-child. An interesting contention, on the child's behalf, that the benefit of the policy had passed to him by virtue of section 56 (1) of the Law of Property Act, 1925, failed also. The section provides that " a person may take an immediate or other interest in land or other property, or the benefit of any . . . covenant or agreement over or respecting land or other property, although he may not be named as a party to the conveyance or other instrument " ; moreover, " property " for this purpose " includes any thing in action " (section 205). Farwell, J., held the section inapplicable, but was not very explicit on the point. In *Re Foster*, *Hudson* v. *Foster*, [1938] 3 All E. R. 357, a similar question arose before Crossman, J., where a father had taken out a policy on the life of his son, payable at the son's death. Again no trust was found ; and the fact that a trust for the son would protect the policy from technical invalidity under the Life Assurance Act, 1774 (for the father had no insurable interest in his son's life), was immaterial. Section 56 of the Law of Property Act was also held to be immaterial, for reasons formulated by recent decisions on restrictive covenants—namely, that the section applies only in favour of " a person to whom the instrument purports to grant something or with whom some agreement or covenant is thereby purported to be made ".

In the last-mentioned case, the premiums due under the policy since the father's death had been paid by the son (or his receiver acting under an order of the master in lunacy) in the mistaken belief that the policy belonged to him. Crossman, J., was therefore asked to decide, in *Re Foster*, *Hudson* v. *Foster* (*No.* 2), [1938] 3 All E. R. 610, whether the son's estate was entitled to recover the premiums from his father's executors. In deciding that the son's representatives were entitled to a charge on the policy moneys for the premiums so paid, Crossman, J., deduced from the reasoning in *Re Leslie* (1883), 23 Ch. D. 552, that, besides the four classes of cases enumerated in that judgment, in which one is entitled to a lien for premiums paid to keep up another's policy (*i.e.*, by contract, or where the payment is made by or at the request of a trustee of the policy or by a mortgagee), a fifth class exists—*viz.*,

cases in which the person paying the premiums did so under a mistaken belief that he was entitled to the policy. The learned Judge held, however, that the lien then arises only if the true owner of the policy, knowing himself to be the true owner, stood by and allowed the payments to be made. *All* the parties, in *Re Foster*, mistakenly believed the son to be entitled. The decision that a lien or charge arose must therefore rest on some other ground. Apparently it was based on an implied contract between the parties: for (at p. 614) the judgment concludes that "all the payments were made by the son and the receiver in accordance with an implied arrangement between all parties".

Will—conflict of laws—capital money under Settled Land Act, 1925—whether "personal estate" within Wills Act, 1861, s. 1—conversion.—A will of "personal estate", made out of the United Kingdom by a British subject, in the form required by the law of the place where he made it, satisfies section 1 of the Wills Act, 1861. By virtue of the equitable doctrine of conversion, the interest of a beneficiary in land held upon trust for sale is "personal estate" for this purpose—*Re Lyne's Settlement Trusts*, [1919] 1 Ch. 80. The question has now arisen whether invested capital money under the Settled Land Act, 1925, is notionally converted into realty by section 75 (5) of that Act, or whether it is "personal estate" within the Act of 1861. Section 75 (5) enacts that "capital money arising under this Act . . . and securities on which an investment of any such capital money is made shall for all purposes of disposition, transmission and devolution be treated as land. . . ." It is therefore arguable that invested capital money is not "personal estate" for the purposes of the Wills Act, 1861. Nevertheless, in *Re Cartwright, Cartwright* v. *Smith*, [1938] W. N. 264; 3 All E. R. 391, Bennett, J., decided that it is "personal estate" for this purpose. Accordingly, a French will made by a British subject in France was held effective to dispose of the testator's interest in the invested proceeds of sale of English settled land. Although, in *Re Twopenny's Settlement*, [1924] 1 Ch. 522, all the members of the Court of Appeal were unanimously of opinion that the identical provision in the Settled Land Act, 1882, operated to convert such investments into realty, the learned Judge appears to have distinguished that decision on the ground, *semble*, that the devolution of real property was then different from that of personal property, whereas now there is no such difference: consequently, section 75 (5) "is in fact now inoperative". This

view is not easily reconcilable with decisions such as *Re Carrington*, [1932] 1 Ch. 1, C. A., which appear to assume that the doctrine of conversion survived the changes wrought by the Property Acts.

Will—construction—absolute legacy settled by codicil on legatee for life—death of legatee in testator's lifetime—whether lapse.—Where a settled legacy is given by a will, the death of the tenant for life in the lifetime of the testator ordinarily operates merely to accelerate the interests of the remaindermen. Where, however, the will gives an absolute legacy, and then proceeds to settle it upon the legatee for life with remainder over, indications have sometimes been found in the will that the settlement was intended only as a settlement of what the legatee in fact obtains under the absolute gift (*e.g.*, *Re Roberts* (1885), 30 Ch. D. 234, C. A., where shares of residue given to nephews and nieces were settled, with a proviso that the share of any dying under twenty-one should accrue to the other or others). Where the will shows that such was the testator's intention, the failure of the absolute legacy by lapse destroys the attempted settlement. In *Re Harwood*, *Newton* v. *Bankes*, [1938] Ch. 632, the testatrix by her will directed her trustees to stand possessed of her residuary trust fund as to £5,000 for her daughter absolutely. By a subsequent codicil she settled this legacy upon the daughter for life, with remainder to such persons as would be entitled, at the daughter's death, as statutory next-of-kin of the testatrix. Her daughter died before her. Simonds, J., held that no lapse resulted: the statutory next-of-kin of the testatrix were therefore entitled under the codicil. On a true reading of the will and codicil together, they were plainly intended to give the daughter a life interest only—not an absolute interest coupled with a settlement of that to which she would thereby become entitled. No emphasis was laid upon the fact that the legacy here was settled by a subsequent codicil; but this may have strengthened the decision. Although the nature of the remainder—"to the persons who would, on the death of my daughter, as my next-of-kin become entitled thereto"—suggested that the settlement was conditional on the daughters surviving the testatrix, this was not conclusive; for a testator often overlooks the possibility that a legatee may pre-decease him. In *Re Roberts* (*supra*) the presence of such a remainder was one of the grounds for deciding that the settlement failed: "It would be a most whimsical provision to give to the persons who were the next-of-kin at the death of a niece who died before him" (*per* Cotton, L.J., at p. 237). But both Chitty, J.,

in *Re Pinhorne*, [1894] 2 Ch. 276, and Simonds, J., in the present case, were satisfied that the " whimsical " nature of the gift, when so construed, is not fatal.

Will—construction—amount of legacy—inconsistency between words and figures.—The rule that in a will the later of two inconsistent provisions prevails was applied by Simonds, J., in *Re Hammond, Hammond* v. *Treharne*, [1938] W. N. 236; 3 All E. R. 308. Although this rule, like other rules of construction, gives way to the context, the context in the present case tended in the same direction. A clause of the will in question bequeathed, by a single sentence, a sum to each of five charities. In each case the amount of the legacy was stated in words followed by figures in parentheses. In each case the amount was stated as " Five hundred pounds (£500) ", save that for the fourth-named charity it was stated as " One hundred pounds (£500) ". This, also, the Court construed as a bequest of five hundred pounds. Apparently, the rule that words prevail over figures has been applied only to commercial documents.

Will—construction—bequest of " my business of a solicitor "—legatee subsequently taken into partnership—what assets pass under the bequest.—In *Re Rhagg, Easten* v. *Boyd*, [1938] W. N. 258; 3 All E. R. 314, the testator made a will, in 1934, bequeathing to B. " my business of a solicitor and the office furniture law-books and other articles in my office ". At that date B., a qualified solicitor, was employed by the testator in his business as his clerk. In 1935, B. became a partner with the testator in the business. In 1937 the testator died. On these facts, Simonds, J., held (i) that the bequest was not adeemed by the partnership agreement, but must be construed as a bequest of the testator's share of the partnership business; and (ii) that the bequest, so construed, carried to the legatee all the rights of which, under the partnership agreement or under the general law relating to partnership, the testator was able to dispose. It therefore carried the testator's share in everything which was treated by him as an asset of the business, including the goodwill, the business premises, undrawn profits, certain sums which he had advanced to clients when carrying on business alone, and such money at the bank as could be identified with the business. The fact that certain assets (office furniture, etc.) were specifically mentioned in the bequest did not restrict the meaning of the word " business " to goodwill only; for,

despite the maxim *expressio unius exclusio alterius*, they did not indicate here an intention to limit the bequest to any particular asset or assets of the business. The authority chiefly relied upon was *Re Barfield* (1901), 84 L. T. 28, where a solicitor had bequeathed to his partner " all my share and interest in the business of solicitors carried on by me and him as co-partners ". (A recent Irish case on a somewhat similar point is *Re Spence, Wilkinson* v. *Arlow*, [1938] N. Ir. 83, where a testatrix bequeathed the income and benefit of her business to her brother for life with remainder to her nephew absolutely.)

Will—construction—" money in the bank "—money in wife's banking account.—In *Re Lowe's Estate, Swann* v. *Rockley*, [1938] 2 All E. R. 774, the testator made a will some years after the death of his wife, who had bequeathed to him a life interest in her residuary estate. By his will he bequeathed " my watch and chain, stock in the shop and fixtures, all money in the bank, War stock, club money along with any money in hand " to be divided equally between A and B. After his death it was discovered that his wife had deposited a substantial sum in a bank under her own name, and that, by virtue of his life interest in her residuary estate, he was entitled therefrom to some £800 which had accrued as interest since she died. Bennett, J., held that the testator's claim against his wife's executors to this part of the sum so standing to her credit was in no sense his " money in the bank "; that the testator plainly meant, by the words " all money in the bank ", money in a bank over which money he had control; and that he had no control over the money which stood to the credit of his deceased wife's account.

Will — construction — special power of appointment — whether exercised by residuary gift—" I give and appoint ".—In order to exercise a special power of appointment, a will must either refer to the power or to the subject-matter of the power, or otherwise show an intention to exercise it. The many decisions on this matter are not easy to reconcile. They appear to show, *inter alia*, (i) that a gift of the testator's property with any over which he has any disposing power may include a special power of appointment if he has no other, and that the use of the word " appoint " strengthens the case; (ii) that although the property is given as a residue or on trust to pay the testator's debts or on trust to convert,

or the donees include persons who are not objects of the power, neither of these indications is necessarily inconsistent with an intention to exercise the power (see *Theobald on Wills* (8th ed.) 272—278). In *Re Beresford's Will Trusts, Sturges* v. *Beresford*, [1938] 3 All E. R. 566, the testator had a testamentary special power to appoint among his issue, other than a named child. His will, after making certain specific gifts, proceeded as follows: "I give devise bequeath and appoint all the rest residue and remainder of the estate and effects whatsoever . . . to which I shall be entitled or of which I shall have power to dispose at my decease and including any entailed property and lapsed gifts unto the bank upon trust for sale and conversion. . . ." He directed the bank to pay his debts, etc., out of the proceeds of the conversion or out of any ready money, and to invest the remainder and pay the income thereof to his wife for life and subject thereto upon trust for such of his children as should reach twenty-one, or being female marry under that age, in equal shares. On these facts, Morton, J., held that the residuary gift did not exercise the special power of appointment. Although it used the word "appoint", the fact that this will, even in specific gifts confined to the testator's own property, employed the words "I give and appoint", robbed the word of its normal significance. Although the words "of which I shall have power to dispose" were susceptible of including property over which the testator had a special power of appointment, the residuary gift contained so much that was inappropriate to the exercise of the power in question that it was impossible to conclude that the testator thereby intended to exercise it. Thus, the residuary gift imposed a trust for conversion, yet the property comprised in the power was already subject to such a trust; the proceeds of the conversion of the residuary gift were to be available for payment of testator's debts, yet this could not be so as to property comprised in the special power; his widow, who was not an object of the power, was given a life interest in the residue; and the remainder therein failed to exclude the child who was specifically excluded by the power. It is therefore apparent that a number of slight indications, no one of which is necessarily conclusive in itself, may together suffice to show that words susceptible of including property comprised in a special power were not in fact intended to include it. Several previous decisions were mentioned, but the learned Judge relied chiefly upon *dicta* to the effect that the question is purely one of the testator's intention and of weighing conflicting indications in the will, and that little assistance is to be got from previous decisions on wills differing in form and expression from that under consideration.

Will—contingent life interest in residuary fund—maintenance during minority—Trustee Act, 1925, s. 31 (3).—Under the general law before 1926, a contingent gift of residuary personalty carried with it the intermediate income, unless otherwise disposed of; and, pending the contingency, the income was ordinarily accumulated (within the limits allowed by the Accumulations Act): see *Re Taylor*, [1901] 2 Ch. 134. The modern statutory power of maintenance, under the Trustee Act, 1925, s. 31 (3), " applies in the case of a contingent interest only if the limitation or trust carries the intermediate income ". In *Re Leng, Dodsworth* v. *Leng*, [1938] 3 All E. R. 181, the will created a residuary trust fund for the testator's children who should reach twenty-one in equal shares, and settled each child's share so that the child would take only a life interest therein on attaining twenty-one. The testator's children being under age, the trustees desired to know whether they were maintainable out of the intermediate income. Simonds, J., held that they were. The trust " carries the intermediate income " within the meaning of section 31 (3), in spite of the above general rule whereby intermediate income is accumulated and added to the corpus of the fund. Before 1926 the children would have been maintainable in such a case, and the sub-section was not intended to alter the existing law. *Re Reade-Revell*, [1930] 1 Ch. 52, where Clauson, J., held that there was no power to maintain out of intermediate income, was distinguishable; for there the will *expressly* directed that the income of the settled legacy, pending the contingency, should be accumulated and added to the corpus.

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4. *INCOME TAX CASES.*

By L. J. Stein, Barrister-at-Law.

[*Note.*—The decisions selected for notice are not necessarily those of the greatest importance from the standpoint of the income tax practitioner, but those most germane to the matters with which *The Conveyancer* is primarily concerned.]

Practice under Crown Suits Act, 1865—proceedings against persons resident out of the jurisdiction.—The effect of section 37 of the Crown Suits Act, 1865, is that where it is desired to institute proceedings by way of information against a taxpayer who is a British subject resident out of the jurisdiction, such proceedings may be started by the suing out against that person

of a writ of subpœna, endorsed to the effect that the writ is for service out of the jurisdiction. Provided that it is shown that the defendant has had a reasonable opportunity of appearing, the Court may give judgment against him, if satisfied as to the merits of the claim. The 1865 Act enables the writ of subpœna to be sued out and served out of the jurisdiction without any application to the Court. Service out of the jurisdiction is dealt with in Order XI of the Rules of the Supreme Court, but by Order LXVIII those Rules do not apply to Revenue proceedings save as expressly provided, and there is no express provision relevant to the application of section 37 of the 1865 Act. In 1932, however, Order LXVIII was amended so as to introduce the Rule now appearing as Rule 3, which provides that Order XI "shall apply, as far as it is applicable, to . . . proceedings on the Revenue side of the King's Bench Division". The question which arose in *Att.-Gen.* v. *Prossor*, [1938] W. N. 211, was whether proceedings for the recovery of surtax instituted in 1935 against a British subject resident out of the jurisdiction under section 37 of the Crown Suits Act, 1865, could be set aside on the ground that leave to serve the writ out of the jurisdiction had not been obtained under Order XI. The Court of Appeal was unanimous in rejecting this contention—mainly on the ground that Order XI was not a restrictive Order but one which extended the jurisdiction of the Court, and that Order XI itself contemplates, in Rule 11, the existence of cases in which a writ can be served out of the jurisdiction without application to the Court. One of those cases is that provided for by section 37 of the 1865 Act, and there is—it was held—nothing in Rule 3 of Order LXVIII which in any way cuts down the operation of that section in accordance with the practice hitherto in force.

Penalties—executor's liability.—The decision in *Att.-Gen.* v. *Canter*, Tax leaflet No. 977, sets at rest a doubt which has existed ever since the coming into force of the Law Reform (Miscellaneous Provisions) Act, 1934, as to the liability of executors for penalties relating to tax offences by a deceased taxpayer. After the death of a certain individual, it came to the knowledge of the Revenue authorities that he had made himself liable to penalties. The liability had arisen more than six months before the death of the deceased, and it followed, by reason of the provisions of section 1 (3) of the 1934 Act, that, if penalty proceedings were

in respect of a cause of action in tort, no such proceedings could in this case be maintained against the executors. On this point it was held by Lawrence, J., that a claim to penalties under the Income Tax Acts was not a cause of action in tort within the meaning of sub-section 3, but was a claim for a debt created by the Statutes. That being so, it only remained to consider whether there was any reason for excluding penalty proceedings from the words " all causes of action " in sub-section 1. It was pointed out in the argument that section 4 (2) of the 1934 Act provides that the Act shall not extend to Scotland or Northern Ireland, from which it follows that if penalty proceedings are within the scope of section 1, such proceedings will be maintainable against executors where the matter is within the jurisdiction of the English Courts, though they would not be maintainable in exactly similar circumstances where the matter happened to be within the jurisdiction of the Courts of Scotland or Northern Ireland. The learned Judge, however, arrived at the conclusion that this consideration was not strong enough to cut down the wide language of section 1, and that, in spite of any anomaly which might be involved, there was no sufficient reason for thinking that the words " all causes of action " did not include the Crown's claim to penalties under the Income Tax Acts.

Schedule B—lands used partly for market-gardening and partly for husbandry.—Two points of some interest to taxpayers assessable under Schedule B were considered by the Court of Session in *David Lowe & Sons, Ltd.* v. *C. I. R.*, 17 A. T. C. 22. The appellants were the occupiers of two contiguous parcels of land which they used for growing vegetables for sale. They were also the occupiers of a further parcel of land consisting of 280 acres, of which 110 acres were used, in the period under consideration, for growing vegetables for sale, and the remaining 170 acres for growing cereal crops in the way of ordinary farming. The Schedule B assessment is, of course, normally based on the annual value, but Rule 8 of the Rules of Schedule B provides that the profits arising from " lands occupied as nurseries or gardens for the sale of the produce ", though assessable under Schedule B, shall be computed according to the provisions of Schedule D. The language of the Rule is not very felicitous, but what is obviously meant to be conveyed is that the Schedule D basis of computation is to apply where the lands are occupied as nurseries or gardens and the produce is grown for sale. The Court of Session found no difficulty in deciding, contrary to the contention of Messrs.

Lowe, that land used for the production of vegetables for sale for human consumption is a garden for the sale of produce within the meaning of Rule 8, and that a garden is none the less a garden for the purposes of Rule 8 because the produce consists of vegetables, as distinct from flowers or fruit. It was held to be immaterial that the whole of Messrs. Lowe's holdings, both those used for vegetable-growing and those used for ordinary farming, were worked as a single unit with the same employees, horses and implements; the test in the case of any given lands is simply how those particular lands were in fact occupied in the period under consideration. But on the footing that Messrs. Lowe could not contend that none of their lands were occupied as gardens for the sale of produce within the meaning of Rule 8, a further question arose as to the treatment of the holding of 280 acres, which was used as to 110 acres for vegetable-growing and as to the remainder for ordinary farming. What the Commissioners had decided was that because the 280 acres were held under a single lease, it did not follow that the holding must be treated, for the purposes of Schedule B, as an indivisible whole. They had accordingly held that the part used for vegetable-growing was assessable under Rule 8 and the remainder on the basis of annual value in the ordinary way. This apportionment was upheld by the Court of Session, on the principle that what has to be considered is in every case the actual nature of the occupation, and that if different parts of an area leased as a single unit are occupied for different purposes, there is nothing to prevent the distinction from being reflected in the Schedule B assessment.

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THE LAW OF NEGLIGENCE. By J. CHARLESWORTH, LL.D., Barrister-at-Law, Recorder of Pontefract. London: Sweet & Maxwell. 1938. pp. lxviii + 576. Price 40s.

On the surface a book on Negligence would appear to be outside the scope of this journal. It is essentially a matter of common law, and since conveyancing has become so much within the province of Chancery Division and Lincoln's Inn, it has come to be looked upon as a branch of equity jurisprudence. This is unsound and also peculiar in view of the paramount importance of legal estates and interests in the realm of conveyancing. In fact the fabric of real property law and, therefore, of conveyancing,

has been built by common lawyers upon the foundations of the common law. Many of the peculiar and difficult rules are the results of this foundation, and an essay may one day profitably be written on the impact of Equity Judges upon the Common Law Rules. Negligence, however, comes home more directly if it includes within its ambit, as does Dr. Charlesworth's book, the variety of peculiar rules arising from such matters as dangerous premises, water, gas and electricity, to name no others. There is a tendency for negligence to connote, in the minds of many, " running down cases ", and this is, of course, an important branch of the subject. Actually it " touches and concerns " a much wider field. For example, an owner of premises is liable for damage due to their dangerous condition if he has contracted to do repairs (see pp. 143—145). The conveyancer should bear this in mind in drawing leases and tenancy agreements and in appropriate circumstances consider the desirability of insurance. In fact, in connection with conveyancing, liability for negligence and insurance against loss are inseparable topics as is the kindred matter of covenant by way of indemnity. The uses to which property may now be put are so various that the problem of liability in negligence, within the wide ambit so described, is a subject calling for constant consideration.

Dr. Charlesworth's book is a comprehensive treatise which combines the merit of critical analysis with full treatment and reference to the authorities, the main point and facts of which are briefly but clearly stated. The fact that some two thousand five hundred cases are cited is sufficient evidence of the exhaustive character of the work, and many of the important cases are examined at length and with penetration. The division of the book into chapters dealing with specific topics and a sound index makes it easy of reference. A really up-to-date practical work on this subject was, we feel, badly needed and we offer this volume a warm welcome and commend it to all practitioners.

THE RENT AND MORTGAGE INTEREST RESTRICTIONS ACTS, 1920 TO 1938. Ninth edition. By ARCHIBALD SAFFORD, of the Middle Temple, Barrister-at-Law. 1938. London: Sweet & Maxwell, Ltd., 2 & 3 Chancery Lane. xxxii + 335 pp. Price 10s. 6d.

Practitioners will welcome the ninth edition of this well-known and popular work on the Rent Restrictions Acts. The Rent, etc. (Restrictions) Act, 1938, is now included, together with notes on rent restrictions cases reported up to and including May 1938.

The Introduction contains a useful outline of the main features

of Rent Restriction law as it now exists, and should be read carefully to refresh the memory as to the general state of the law and to place in their proper perspective the various changes made by the new Act. It is well provided with footnotes referring to the body of the book, so that the reader can readily lay his hands upon the authority for each matter touched upon in the Introduction.

The main part of the book consists of the text of the various Acts with detailed annotations section by section, the complete text of the statutes now in force being also set out in an Appendix. The annotations to each section provide the reader with comprehensive cross-references to other provisions of the Rent Acts, and with references also to relevant decided cases, so as to direct attention at once to all material which bears upon any particular question in issue. This renders the book of great practical utility for handy reference, and the new edition lives up to the reputation already earned by the work as a useful guide to a most intricate and confusing subject. A well-planned Index further assists easy reference.

The annotations to the Act of 1938 are on the whole shorter than the notes on the earlier Acts, the annotations to many of the new sections consisting simply of cross-references. In the case of several of the new provisions, however, the effect of the enactment is discussed and useful examples are given. Perhaps the suggestion may be made that more of the provisions might with advantage have been treated in this way, as a number of the sections are so involved that many practitioners would have found extremely useful a little more space devoted to the discussion of obscure points. One provision which is already causing difficulty is section 7 (2). Mr. Safford cautiously states that this sub-section "appears to overrule", *inter alia*, *Nicholson* v. *Jackson* (1921), 90 L. J. K. B. 1121, and *Strood Estates Co.* v. *Gregory*, [1938] A. C. 118. The inclusion of the latter case would appear to be a mistake; that case relates to the definition of "net rent", and is not affected by section 7 (2) of the new Act. And while this sub-section was seemingly intended to overrule *Nicholson* v. *Jackson*, the precise extent to which it does so is a debatable point. These points of criticism in themselves serve, however, to emphasise the value to the practitioner of Mr. Safford's book, which provides an invaluable guide to the maze of Rent Act legislation.